Supreme Court, U.S.
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No. 97-

In the Supreme Court of the United States

OCTOBER TERM, 1997

AETNA LIFE INSURANCE COMPANY,

Petitioner,

v.

SHERRIE ACE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In reviewing a district court's decision to grant a new trial, the Ninth Circuit applies a "stringent standard" — which the Seventh Circuit has expressly rejected — under which it will not permit the trial court to exercise its discretion to grant a new trial based on the weakness of the evidence, unless the verdict is against the "great weight" of the evidence or is "seriously erroneous," and the Ninth Circuit accords minimal deference to that determination. In this case, which involves a $16.5 million punitive damage verdict based on the alleged "bad faith" denial of insurance benefits worth $27,000, the trial court granted a new trial on punitive damages, but the Ninth Circuit, applying its "stringent standard," reversed.

1. Does the Ninth Circuit's "stringent" rule for new trial orders based on evidentiary weakness —

> which (a) prohibits trial judges from awarding new trials unless the verdict is against the "great" weight of the evidence, (b) subjects such orders to a standard of review more "stringent" than "abuse of discretion," and (c) squarely conflicts with the broader discretion allowed in other circuits

— create an unauthorized barrier to relief from problematic verdicts and excessively intrude on trial judges' discretion to grant new trials?

2. Because this Court has held that the Due Process Clause requires searching post-verdict judicial review of punitive damage verdicts, should the Court also require appellate courts to extend the maximum deference possible under the "abuse-of-discretion" standard, when the trial judge concludes that a punitive award is unwarranted, dubious, or excessive, and orders a new trial?

3. When a court of appeals concludes that a trial judge did not make sufficiently specific findings under Fed. R. Civ. P. 50(c)(1) explaining the grant of a "conditional" new trial, should the proper practice be for the appellate court to remand for more detailed findings rather that to reverse the new trial decision outright and reinstate the original verdict?

RULE 29.6 STATEMENT

Petitioner Aetna Life Insurance Company states that its parent companies and non-wholly owned subsidiaries consist of:

Aetna Inc. (parent)

Aetna U.S. Healthcare, Inc. (parent)

Aetna Chile Seguros Generales S.A. (a Chilean corporation)

Administradora de Fondos de Pensiones Santa Maria, S.A. (a Chilean corporation)

Aetna Capital L.L.C.

Amerin Corporation

Fianzas Monterrey, S.A. (a Mexican corporation)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED I

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

FEDERAL RULES INVOLVED 3

STATEMENT 4

A. Aetna's Evaluation of Ace's Claim For Benefits . . 4

B. The Trial, Verdict, And Post-Verdict Motions . . . 6

C. The Ninth Circuit's Decision 9

REASONS FOR GRANTING THE PETITION 11

I. THE NINTH CIRCUIT'S ERRONEOUS STANDARDS FOR GRANTING AND REVIEWING NEW TRIAL ORDERS BASED ON THE SUFFICIENCY OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS 14

II. DUE PROCESS REQUIRES SPECIAL DEFERENCE ON APPEAL TO ORDERS GRANTING NEW TRIALS ON PUNITIVE DAMAGE VERDICTS 24

III. IF FINDINGS ARE INSUFFICIENT UNDER RULE 50(c)(1) TO EXPLAIN THE GRANT OF A NEW TRIAL, THE PROPER PROCEDURE IS TO REMAND FOR ADDITIONAL FINDINGS, NOT TO REVERSE OUTRIGHT 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 14

Binder v. *Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995) 15

Books v. *Chater*, 91 F.3d 972 (7th Cir. 1996) 28

Browning-Ferris Industries of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) . . . 14, 25-26

Byrd v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958) 14, 17

Calderon v. *Thompson*, ___ U.S. ___, 118 S. Ct. 1489 (1998) 20

Carter v. *DecisionOne Corp.*, 122 F.3d 997 (11th Cir. 1997) 16

Carter v. *Fenner*, 136 F.3d 1000 (5th Cir. 1998) 16

Chizmar v. *Mackie*, 896 P.2d 196 (Alaska 1995) 12

Collazo-Santiago v. *Toyota Motor Corp.*, No. 97-1365, 1998 U.S. App. LEXIS 15330 (1st Cir. July 9, 1998) 19

Cooter & Gell v. *Hartmax Corp.*, 496 U.S. 384 (1990) 20

EEOC v. *Pape Lift, Inc.*, 115 F.3d 676 (9th Cir. 1997) 16

Gasperini v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*

General Electric Co. v. *Joiner*, ___ U.S. ___, 118 S. Ct. 512 (1997) 21

TABLE OF AUTHORITIES — Continued

Page(s)

Gutierrez-Rodriguez v. *Cartagena*, 882 F.2d 553 (1st Cir. 1989) 19

Harte-Hanks Communications, Inc. v. *Connaughton*, 491 U.S. 657 (1989) 25

Hetzel v. *Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998) 18, 21

Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) 11, 25

Kelley v. *Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998) 19

Kirsch v. *Fleet Street, Ltd.*, Nos. 96-9631, 97-7021, 1998 U.S. App. LEXIS 13516 (2d Cir. 1998) 18

Liddell v. *Board of Educ.*, 20 F.3d 324 (8th Cir. 1994) 29

Lind v. *Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835 (1960) 15, 17

McClain v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124 (7th Cir. 1998) 21

Medcom Holding Co. v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) 1, 18

Miksis v. *Howard*, 106 F.3d 754 (7th Cir. 1997) 20

Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940) 1, 14-15, 18

National Hockey League v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976) 20

TABLE OF AUTHORITIES — Continued

Page(s)

NAACP v. *Town of East Haven*, 70 F.3d 219 (2d Cir. 1995) 29

Preferred RX, Inc. v. *American Prescription Plan, Inc.*, 46 F.3d 535 (6th Cir. 1995) 29

Rattray v. *City of National City*, 51 F.3d 793 (9th Cir. 1994), cert. denied, 516 U.S. 820 (1995) 25

Reich v. *Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995) 28

Santa Maria v. *Metro-North Commuter R.R.*, 81 F.3d 265 (2d Cir. 1996) 18

Sheridan v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1995), cert. denied, 117 S. Ct. 2532 (1997) 16

South-Western Publishing Co. v. *Simons*, 651 F.2d 653 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) 28

Spurlin v. *General Motors Corp.*, 528 F.2d 612 (5th Cir. 1976) 16-17

Taylor v. *Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), cert. denied, 396 U.S. 835 (1969) 19, 26

TEC Engineering Corp. v. *Budget Molders Supply, Inc.*, 82 F.3d 542 (1st Cir. 1996) 29

Constitutional Provision, Statutes, and Rules:

U.S. Const., amend. V . . . . . *passim*

28 U.S.C. § 1254(1) 3

AS § 09.17.020 12

TABLE OF AUTHORITIES — Continued

Page(s)

Fed. R. Civ. P. 50(c)(1) . . . . . *passim*

Fed. R. Civ. P. 52(a) 28

Fed. R. Civ. P. 59 25

Fed. R. Civ. P. 59(a) 17, 28

Fed. R. Civ. P. 59(c) 28

Miscellaneous:

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PETITION FOR A WRIT OF CERTIORARI

The jury in this case returned a verdict for respondent Sherrie Ace, finding that petitioner Aetna Life Insurance Company had "wrongfully withheld" nine-months of long-term disability insurance benefits worth $27,000. The jury also imposed punitive damages of $16.5 million on Aetna. The district judge, who had heard all of the testimony and examined all of the exhibits, expressed "surprise" at the jury's punitive damages decision. In a subsequent, detailed opinion, he granted Aetna's motion for judgment as a matter of law on punitive liability. He also granted Aetna's motion under Fed. R. Civ. P. 50(c)(1) for a "conditional" new trial on punitive damages, in the event the court of appeals found the evidence sufficient to preclude judgment for Aetna as a matter of law.

On appeal, the Ninth Circuit reversed not only the judgment for Aetna, but also the district court's "conditional" new trial order. In reversing the award of a new trial on punitive liability, the court of appeals eschewed the "weight of the evidence" and "abuse of discretion" standards propounded and refined by this Court, see, *e.g.*, *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 434 (1996); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940), in decisions which the Seventh Circuit has expressly ruled do not permit the "stringent" standards applied by the Ninth Circuit. See, *e.g.*, *Medcom Holding Co.* v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1997).

Under the correct standards, a trial court may grant a new trial if the verdict "appears" to the judge to be against the "weight of the evidence," and the appellate court in turn is limited to reviewing that assessment for "abuse of discretion."

Instead of following this approach, the Ninth Circuit applied its own more "stringent standard," under which a "district court may order a new trial based on insufficient

evidence only if it finds that the jury's verdict 'is against the *great weight* of the evidence, or it is *quite clear* that the jury has reached a *seriously erroneous* result.'" App., *infra*, 14a (emphasis added; citation omitted). These special constraints deprive federal trial judges in that Circuit (and in several others that follow the Ninth Circuit's tests) of the traditional flexibility to evaluate the "weight of the evidence" and in "the interest of justice" to set aside verdicts that "appear" to be unwarranted.

The erroneous standards applied in the Nation's largest circuit, which several other circuits also follow, is especially pernicious in the context of judicial review of punitive damages verdicts, where the Due Process Clause compels searching post-verdict scrutiny. In punitive damages cases, the trial court has a unique position to view the evidence and to serve as a judicial check on unwarranted or excessive punishment. Its exercise of discretion to order a new trial on punitive damages should be subject to substantial deference under the abuse-of-discretion standard rather than being subjected to the "stringent," and entirely non-deferential, standard applied by the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App. A) is reported at 139 F.3d 1241. The order of the court of appeals amending its opinion (App. B) is unreported. The original opinion of the court of appeals (App. C) is also unreported. The order of the district court granting Aetna's motion for a conditional new trial on punitive damages (App. D) is unreported. The order of the district court granting, in part, Aetna's motion for judgment as a matter of law (App. E) is also unreported.

JURISDICTION

The original opinion of the court of appeals was entered on April 12, 1998. Acting on timely petitions for rehearing

by both parties, the court of appeals entered an order on May 7, 1998, granting the rehearing petitions in part and amending the court's opinion. The Ninth Circuit treats that date as the date of entry of its judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

The Federal Rules of Civil Procedure provide in pertinent part:

> **Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings**
>
> * * *
>
> **(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion**
>
> (1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. * * *
>
> **Rule 59. New Trials; Amendment of Judgments**
>
> **(a). Grounds.** A new trial may be granted to all or any of the parties on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials

> have heretofore been granted in actions at law in the courts of the United States; * * *.

STATEMENT

A. Aetna's Evaluation of Ace's Claim For Benefits.

The State of Alaska contracted with Aetna to make available to employees, under defined conditions, insurance coverage for short-term disability ("STD") and long-term disability ("LTD"). App. 3a-4a. The State published a benefits booklet that described the terms on which LTD benefits were payable:

> "To receive benefits from this plan, you must be totally disabled. That is, you are unable to work at any gainful occupation due to sickness or injury, and under care of a physician. Medical certification is required." *Id.* at 59a-60a; ER 22.[1]

The "unable to work at any gainful occupation" language describing the standard for LTD benefits was required by the State contract, and is "not common" in Aetna LTD insurance agreements. App. 60a; SER 47, 52.

Sherrie Ace was a loan examiner for the State. App. 3a. In December 1986, Ace injured her knee while sledding. As a result, she required several surgeries by Dr. McEvoy over the next six years. *Ibid.* In April 1992, Dr. McEvoy performed an osteotomy on Ace's knee. Following this surgery, Ace obtained STD benefits from Aetna. When her STD benefits lapsed, Ace applied for LTD benefits in September 1992. *Id.* at 3a-4a.

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[1] "ER" refers to the Excerpt[s] of Record filed by Ace in the court of appeals and "SER" refers to the Supplemental Excerpts of Record filed by Aetna; and "Tr." refers to the trial transcript, identified first by volume followed by page number(s).

With her LTD application, Ace submitted a report from her family physician, Dr. Kiessling, who opined that Ace suffered from "severe degenerative joint disease." App. 4a. He "rated her to be between 30-50% ['capable of light work'] and 50-70% ['capable of clerical/administrative (sedentary) activity'] physically disabled." *Ibid.* Ace's LTD application also included a work release from her orthopedic surgeon, Dr. McEvoy, dated July 27, 1992, authorizing her to perform half-time, light-duty work for six weeks as of August 1, 1992. *Id.* at 3a-4a; ER 99. The surgeon stated:

> "This half time should continue for six weeks after which time she can be converted to full time * * *. After six weeks [I] would anticipate that these restrictions can gradually be diminished and she could hopefully return to a more vigorous level of activity." *Ibid.*

After receiving Ace's submissions, Aetna forwarded the medical records to Dr. Galvin, a medical consultant who reviewed disability benefit claims. App. 5a, 61a; 4 Tr. 116. Dr. Galvin reported that Ace had not established a long-term disability and could perform her own occupation as a loan examiner. App. 5a; SER 156-157.

Relying on Ace's submissions and Dr. Galvin's analysis, Aetna informed Ace on November 17, 1992, that her LTD benefits claim was denied, explaining:

> "In order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful occupation due to bodily injury or illness. * * *
>
> "The most current medical information we have * * * has revealed that you are capable of performing clerical, sedentary-type employment. Your old occupation as a loan examiner would be considered to be sedentary-type employment. Therefore, we

> cannot consider you as being totally disabled from performing the duties of any gainful occupation as required by the policy * * *." App. 5a-6a; ER 57-58.

Aetna also advised Ace that she was "entitled to a review of this benefit determination," and explained the review process. ER 57-58.

Over the next four months, Ace submitted several requests for reconsideration (App. 6a-10a), which included more materials from her family physician, Dr. Kiessling, and two physical therapists. Dr. Kiessling changed his opinion of Ace's condition, concluding that it "had worsened since his earlier [s]tatement, [and] that she * * * was unable to perform clerical work." *Id.* at 7a. Aetna subsequently advised Ace that she "would have to have her physicians 'furnish . . . objective medical evidence to support [her] contention [of total disability].'" *Ibid.*

Although Aetna did not contact Ace's physicians, her requests for reconsideration were reviewed by, among others, Aetna's medical consultant, Dr. Galvin, who concluded that Ace had failed to submit any "objective medical evidence" to support the conclusion that she was totally disabled. App. 7a-10a. Despite this finding, Aetna did not close the case, but instead asked Ace to undergo an independent medical examination ("IME"). After Ace refused to appear for an IME, Aetna denied her claim. *Id.* at 10a, 61a.

Ace had further surgery on her knee in April 1993 (App. 10a) and "[w]ithin two months, [she] was walking without crutches and returned to work." Her alleged "long term" disability ended June 1, 1993, nine months after she sought the benefit. *Ibid.*

B. The Trial, Verdict, And Post-Verdict Motions.

Ace sued Aetna, alleging that Aetna had denied her LTD benefits claim in "bad faith" and that Aetna was liable for

compensatory and punitive damages. App. 2a. After a seven-day trial, the jury returned a verdict finding Aetna liable for the tort of "bad faith" and awarding $27,009 in damages for the "wrongful denial" of LTD benefits, $100,000 in emotional distress damages, and $16.5 million in punitive damages. *Ibid.* Once the jury was discharged, the district court expressed "surprise" (7 Tr. 35-36) at the jury's punitive damage award.

Aetna then filed a motion for judgment as a matter of law under Fed. R. Civ. P. 50 on its tort liability for bad faith and its liability for punitive damages. App. 49a, 51a. The court denied Aetna's motion for judgment on the issue of bad faith liability, finding that "a reasonable jury could have concluded that Aetna breached its obligation to deal fairly and in good faith with Ace." *Id.* at 58a-59a. The court stated:

> "Although it is a close question, particularly in light of the fact that where an insurer has an objectively reasonable basis for denying a claim the denial does not constitute bad faith, * * * this court concludes that when all the evidence is viewed in the light most favorable to Ace, a reasonable jury could have found that Aetna acted in bad faith by not promptly making some affirmative inquiry after receiving Dr. Kiessling's second opinion. * * *" *Ibid.*

Turning to the question of Aetna's liability for punitive damages under Alaska law, which requires "clear and convincing" proof of "outrageous" behavior, the court ruled in Aetna's favor. App. 59a. The court first specifically rejected Ace's argument that the "any gainful occupation" language used in the policy issued by Aetna could support punitive liability here. *Id.* at 60a. Although this language sets a "standard far higher than the law would allow Aetna to enforce literally," this:

> "* * * was not language inserted into a policy presented to an individual insured on a take it or

> leave it basis. The language was contained in a contract between Aetna and a state government. The language was not actually employed by Aetna to deny benefits to Ace. Ace's qualification for disability benefits turned upon whether she was able to go back to work at her own job. That this was the central issue was clearly known by all the Aetna personnel involved in handling the claim. Whatever might be said about quoting back the 'any gainful occupation' language in some other context, it is unreasonable to conclude that on the facts here it shows any malice toward Ace." *Ibid.*

Finally, the court concluded that the "manner in which Ace's claim was actually handled in terms of the information available to Aetna at each step in the process," could not support an award of punitive damages:

> "At all times, Aetna had knowledge of Dr. McEvoy's opinion which, given his role in Ace's care [as her orthopedic surgeon], was never persuasively contradicted by any other information. Moreover, the lay claims personnel referred the medical information to a qualified physician, Dr. Galvin, for review. He found no basis for concluding Ace was disabled. Despite Dr. Galvin's opinion, Aetna did make arrangements for an IME. Surprisingly, Ace declined the IME. * * *
>
> "* * * Plainly put, there is nothing outrageous about relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty." App. 61a-62a.

Aetna also moved under Fed. R. Civ. P. 50(c)(1) for an order "conditionally" granting a new trial on punitive

damages, if a reviewing court disagreed with the judgment in Aetna's favor as a matter of law. In supporting that motion, in addition to offering four reasons why the amount of damages was excessive, Aetna presented three distinct arguments why a new trial on punitive *liability* was warranted:

(1) the verdict was "against the weight of the evidence,"

(2) the verdict was tainted by "unduly speculative" expert testimony, and

(3) Ace's counsel in closing argument had made an improperly inflammatory reference to extra-record, unrelated cases against other companies.

See generally Memorandum of Law in Support of Aetna's Motion for a New Trial, filed July 18,1996.

After considering the extensive briefing on this motion, the district judge granted Aetna a conditional new trial on punitive damages, finding:

> "In general, the court agrees with the arguments advanced by defendant [Aetna] and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision [granting judgment to Aetna notwithstanding the verdict] on the punitive damages claim there will be a new trial on that claim." App. 49a

The court rejected Aetna's motion for a new trial on its underlying tort liability. *Ibid.*

C. The Ninth Circuit's Decision.

Both parties appealed. Ace sought to have the jury's full verdict reinstated. Aetna sought to overturn its liability for the underlying tort or at least to secure a new trial because of various disputed trial rulings. On March 12, 1998, a panel

of the Ninth Circuit reversed the grant of judgment as a matter of law to Aetna on punitive damages, repeatedly asserting — incorrectly — that the evidence in Ace's favor was "undisputed" at trial, and that the district court had simply "ignored" it. App. 36a.

The court also vacated the trial judge's order conditionally granting a new trial on punitive damages. App. 39a. Stating that the district court had not made sufficiently explicit findings to support the order, the majority speculated that "it is a fair inference that it granted a new trial for the same reasons for which it granted [Aetna's motion for] judgment as a matter of law," and thus assumed "that the new trial was granted on the erroneous ground that the evidence was insufficient as a matter of law." *Id.* at 38a.

In asserting those conclusions, the court did not consider the various other "grounds" that Aetna had advanced in seeking a new trial, the "grounds" with which the trial judge had stated his "general" agreement. See page 9, *supra*. Nor did the court remand the matter to the trial judge to provide an opportunity to resolve any uncertainty about the judge's grounds for awarding a new trial on punitive damages.

The court of appeals simply nodded in the direction of the appropriate standard of review but stated:

> "While our review of an order granting a new trial is for abuse of discretion, 'a stringent standard applies when the motion is based on insufficiency of the evidence.' * * * A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result.'" App. 38a-39a (citations omitted).

Applying this "stringent standard," the court concluded that "the record would not support" a finding that the verdict was "against the great weight of the evidence." *Ibid.*

The majority did conclude, however, that the punitive award of $16.5 million was excessive and that any lawful award of punitive damages in this case could not exceed three-times the actual damages. App. 40a-41a. The court thus ordered a remittitur from $16.5 million to $381,000. Judge Fletcher dissented from fixing that sum and would have remanded the matter for the trial judge to address any remittitur in the first instance. *Id.* at 45a-48a.

In response to petitions for rehearing filed by both parties, the court issued an order amending its opinion. App. 22a-24a. The only substantive change in the amended opinion of the court was the deletion of the amount to which the punitive judgment was to be remitted. *Ibid.* Instead, the court simply remanded the case to the district court with instructions to "den[y] Aetna's motion for a new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages in an amount to be determined by the district court." *Ibid.* With this change, Judge Fletcher withdrew her dissent.

REASONS FOR GRANTING THE PETITION

This case raises substantial issues of nationwide significance concerning the scope of the power of federal trial judges to set aside jury verdicts as well as the appropriate role of the courts of appeals in reviewing the exercise of discretion to grant a new trial. The Ninth Circuit's "stringent standard" is particularly unsuitable in cases setting aside awards of punitive damages and allowing a new trial. As this Court has held, in evaluating punitive damage verdicts, careful judicial control is a traditional and important safeguard to ensure fairness in punishments and has a constitutional dimension. See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

The district court in this case properly performed the constitutionally required scrutiny of the punitive damage verdict, finding that the weight of the evidence did not rise to the level of "clear and convincing" proof of "outrageous" conduct that Alaska requires before a jury may award any punitive damages.[2] The trial judge then exercised what this Court has called his "large" discretionary authority, see *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 432-433 (1996), to grant a new trial on Ace's punitive damages claim because of the weakness of the evidence and various other flaws in the determination of both Aetna's liability for punitive damages and the amount of the punishment.

In reversing the district court's new-trial ruling on punitive damages, the Ninth Circuit committed three significant errors, each of which merits plenary review by this Court.

First, it applied its "stringent standard" to constrain the traditional power of federal trial judges to grant new trials based on their view of the weakness of the evidence, limiting the trial judge's discretion to award new trials to cases in which the jury's verdict is against the "*great*" weight of the evidence. App. 14a. Application of this standard, however, conflicts with longstanding decisions of this Court and exacerbates a circuit conflict on this issue, which has become more acute in the wake of this Court's decision in *Gasperini* reaffirming the broad discretion vested in district judges to grant new-trial motions.

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[2] The Alaska Supreme Court long has "held that punitive damages are a harsh remedy 'not favored in law. They are to be allowed only with caution and within narrow limits.'" *Chizmar* v. *Mackie*, 896 P.2d 196, 210 (Alaska 1995). Under the governing Alaska statute, AS § 09.17.020, and case law, punitive damages are not available in tort cases unless the tortfeasor's conduct was "outrageous, [such as] acts done with malice or bad motives or * * * reckless indifference to the interests of another person."

At common law and under general federal practice, the power of the trial court to grant a new trial in what the judge believes is the interest of justice is one of the most significant protections against misguided verdicts. A special "stringent" standard for exercising that power, coupled with intrusive second-guessing of its exercise, has the inevitable effect of leaving in force verdicts that experienced, front-line trial judges consider unfair and unwarranted.

Leaving this conflict in place would undermine one of the central purposes of the Federal Rules of Civil Procedure, which is to establish uniform standards for federal civil litigation throughout the Nation. There is no legitimate reason why federal trial judges in some circuits should have less power to protect litigants against problematic verdicts than their colleagues in other circuits possess and exercise.

Second, the court of appeals failed to appreciate the constitutional significance of the district court's review of the punitive damage verdict. Because of the risk of arbitrary deprivation of property, the Due Process Clause compels trial courts to scrutinize any punitive verdict. And where, as here, a trial judge has reviewed such a verdict and concluded that it is not supported by the weight of the evidence, that conclusion is entitled to the greatest possible deference on appeal.

Third, the court of appeals erred in speculating about the reasons for the district court's grant of a "conditional" new trial under Fed. R. Civ. P. 50(c)(1) and basing its decision to reverse the district court on that speculation. To the extent there was any doubt about the district court's reasons for granting Aetna's motion and ordering a new trial on the entire punitive claim, the sound and accepted practice among the courts of appeals is to remand for clarification of those reasons, not to reverse on the basis of speculation and to order the judge to reinstate the problematic verdict. The

Ninth Circuit's failure to remand in this case thus creates a circuit conflict on this issue as well.

I. THE NINTH CIRCUIT'S ERRONEOUS STANDARDS FOR GRANTING AND REVIEWING NEW TRIAL ORDERS BASED ON THE SUFFICIENCY OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

Under this Court's precedents, the "authority to grant a new trial * * * is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The trial court's authority has a long history at common law, see 1 W.S. Holdsworth, A HISTORY OF ENGLISH LAW 321, 346 (7th ed. 1956), and is premised on the court's broad "power and duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2805 (1995) (citing cases).

In *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940), this Court held that a "motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving." See also *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 540 (1958) ("[t]he trial judge in the federal system has powers * * * to comment on the weight of the evidence and credibility of witnesses, *and discretion to grant a new trial if the verdict appears to be against the weight of the evidence*") (emphasis added).

A. It is questionable whether conditional new-trial orders based on the "weight" of the evidence are reviewable

at all. This Court's emphasis on the trial judges' discretion in *Montgomery Ward* indicated that the conditional award of a new trial is not reviewable in cases like this one:

> "Should the trial judge enter judgment n.o.v. and, in the alternative, grant a new-trial on any of the grounds assigned therefor, his disposition of the motion for a new trial *would not ordinarily be reviewable*, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, *would be governed by the trial judge's award of a new-trial.*" 311 U.S. 254 (emphases added).

This analysis, which this Court has never questioned, let alone overruled, has been interpreted by some courts to mean that the exercise of discretion to order a new trial because of the weakness of the evidence is not reviewable at all. Thus, until recently, a "line of cases" in the Second Circuit held that "a 'trial court order granting or denying a motion for a new trial on grounds that a verdict is against the weight of the evidence is not reviewable on appeal.'" *Binder* v. *Long Island Lighting Co.*, 57 F.3d 193, 201 (2d Cir. 1995) (citations omitted). See also *Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 88 (3d Cir.), cert. denied, 364 U.S. 835 (1960) (some courts have "stated that a motion for a new trial on th[e] ground [that the verdict is against the weight of the evidence] ordinarily is nonreviewable because within the discretion of the trial court," citing *Montgomery Ward*). The Second Circuit, however, has now rejected those authorities and "adopt[ed] the view held by most circuits" asserting power to review such decisions. *Binder*, 57 F.3d. at 202.

B. In any event, the Ninth Circuit's standards for issuing and reviewing such orders — which it applied with vigor in this case — conflict directly and irreconcilably with the standards repeatedly articulated by this Court. And at

least one circuit has squarely repudiated the Ninth Circuit's "stringent" standards.

The Ninth Circuit held that "'a *stringent standard* applies when the motion is based on insufficiency of the evidence'" and that a trial court "may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the *great* weight of the evidence, or it is quite clear that the jury has reached a *seriously* erroneous result.'" App. 14a (emphases added) (quoting *EEOC* v. *Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997)). Several other circuits also apply this more rigorous and more skeptical standard when reviewing new trial orders based on the weight of the evidence. See, *e.g.*, *Sheridan* v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1995) (en banc) (a "stringent standard is necessary to ensure that a district court does not substitute its judgment of the facts and credibility of the witnesses for that of the jury"), cert. denied, 117 S. Ct. 2532 (1997); *Carter* v. *Fenner*, 136 F.3d 1000, 1010 (5th Cir. 1998) (applying stringent standard in order to protect jury verdict); *Carter* v. *DecisionOne Corp.*, 122 F.3d 997, 1004 (11th Cir. 1997) (motion for new trial "may only be granted when the jury's verdict is against the great weight of the evidence").

These courts offer a single rationale for constraining the trial judge's power and applying heightened scrutiny to new trial orders based on the trial judge's evaluation of the weight of the evidence. They argue that the Seventh Amendment precludes a trial judge from exercising the full measure of discretion otherwise accorded him by law. Specifically, these courts express concern that, without a "closer degree of scrutiny and supervision," a trial judge will merely substitute his decision for that of the jury's in derogation of the Seventh Amendment. See *Lind* v. *Schenley Indus., Inc.*, 278 F.2d at 90 ("close scrutiny is required in order to protect the litigant's right to a jury trial"); *Spurlin* v. *General Motors Corp.*, 528 F.2d 612, 619-620 (5th Cir. 1976) (noting

"several jurisdictions" apply a "more exacting" standard to motions seeking new trials on evidentiary grounds because such motions must be viewed "against the background of the Seventh Amendment").

In *Gasperini*, however, this Court flatly rejected this rationale for constraining effective post-verdict review by the trial court, holding that the court may, without offending the Seventh Amendment, exercise the full measure of its discretion to grant a new trial based on its evaluation of the weight of the evidence:

> "The reexamination clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.'" 518 U.S. at 432 (quoting Rule 59(a)).

This authority, the Court held, is "large:"

> "The trial judge in the federal system, has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Ibid.* (citing *Byrd* v. *Blue Ridge Rural Electric Cooperative*, *supra*).

Indeed, the exercise of the district court's broad discretion to set aside a jury's verdict and grant a new trial "is not a derogation of the right of a trial by jury but is one of the historic safeguards of that right." 518 U.S. at 433.

The decision in *Gasperini* has since been applied in numerous cases to support a trial judge's broad discretion to grant new-trial motions in cases precisely like this one. In the Term just concluded, for example, this Court applied *Gasperini* in reaffirming the substantial deference an appellate court must accord to a district judge's decision to order a new trial unconditionally *or* to offer a remittitur in lieu of a new trial: "the trial judge's discretion includes 'overturning

verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur).'" *Hetzel* v. *Prince William County*, ___ U.S. ___, ___, 118 S. Ct. 1210, 1212 (1998) (*per curiam*).

Moreover, following *Gasperini*, some courts — but not all circuits — have reevaluated their more stringent standards for reviewing new-trial orders based on the weight of the evidence.

For example, in the wake of *Gasperini* the Seventh Circuit recently overruled its prior "exacting" standard for such orders. In *Medcom Holding Co.* v. *Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388, 1397 (7th Cir. 1996), the court stated: "At one time we applied [the review] standard * * * more exacting[ly] when the district court granted a new trial because of the Seventh Amendment." The court held, however, that "in light of the Supreme Court's decision in *Gasperini* that an abuse of discretion standard of review does not violate the Seventh Amendment * * * we hereby abandon this practice as unnecessary" and recognized that the "trial judge in the federal system has discretion to grant a new trial if the verdict appears against the weight of the evidence." *Ibid.*

The Second Circuit now also appears to recognize the appropriate scope of the trial judge discretion, stating in *Santa Maria* v. *Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir. 1996) (quoting *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. at 251), that a "new trial must be granted if the court determines that the verdict is against the weight of the evidence." More recently, the Second Circuit quoted *Gasperini* in declaring that "the trial judge has 'discretion to grant a new trial if the evidence appears to [the judge] to be against the weight of the evidence." *Kirsch* v. *Fleet Street, Ltd.*, Nos. 96-9631, 97-7021, 1998 U.S. App. LEXIS 13516 at *34 (June 25, 1998).

The First Circuit has also recently invoked *Gasperini* for the proposition that the "trial judge has 'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.'" *Kelley* v. *Airborne Freight Corp.*, 140 F.3d 335, 355 (1998). This is a departure from prior First Circuit practice. See *Gutierrez-Rodriguez* v. *Cartagena*, 882 F.2d 553, 558 (1989) (applying a "strict standard of review"). However, another panel of the same court even more recently stated that a "strict standard of review" applies to new-trial orders based on the weight of the evidence. *Collazo-Santiago* v. *Toyota Motor Corp.*, No. 97-1365, 1998 U.S. App. LEXIS 15330, at *16 n.6 (July 9, 1998). This apparent intra-circuit conflict underscores the confusion in the lower courts over the appropriate standard for awarding new trials and for reviewing new-trial orders and the need for definitive resolution of the issue.

C. Despite paying lip-service to the "abuse of discretion" standard of appellate review, the Ninth Circuit made plain that it enforces the heavy burden that it imposes on trial judges by subjecting their new-trial decisions to virtual *de novo* review in reevaluating the nature and thrust of the evidence.

The traditional, deferential abuse-of-discretion standard, however, is especially appropriate in reviewing evidence-based decisions ordering new trials. The trial judge enjoys the "unique opportunity to consider the evidence in the living courtroom," and that special perspective "must be respected." *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), cert. denied, 396 U.S. 835 (1969); see also FEDERAL PRACTICE AND PROCEDURE, *supra*, at § 2819 ("the appellate court must defer to the better opportunity the trial judge has to appraise the situation") (citing cases).

As Judge Henry J. Friendly wrote in *Indiscretion About Discretion*, 31 EMORY L. J. 747, 784 (1982), a trial "court's superior opportunities of observation * * * require greater

deference than would be accorded to its formulations of law or its application of law to the facts."

Thus, on appellate review of an order granting a new trial, a court of appeals should "defer to the district court because of its unique position to view the evidence and the course of the trial." *Miksis* v. *Howard*, 106 F.3d 754, 757 (7th Cir. 1997); cf. *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 404 (1990) ("[d]eference to the determination of [the] courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court").

Abuse-of-discretion review, of course, is not a mere rubber stamp for any decision reached by the trial court. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405. But the court of appeals may not simply substitute its judgment for that of the district court. See *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) ("[t]he question * * * is not whether this Court, or whether the Court of Appeals, would as an original matter" have taken the same action; "it is whether the District Court abused its discretion") (citation omitted); see also *Calderon* v. *Thompson*, ___ U.S. ___, ___, 118 S. Ct. 1489, 1506-1507 (1998) (Souter, J., dissenting) ("a high degree of deference to the court exercising discretionary authority is the hallmark of such review"; "abuse of discretion" standard compels deference to any "reasonable" conclusion by trial judge).

Where the district court makes a reasoned decision about the quantity and quality of the evidence supporting a verdict and decides that a new trial is appropriate, the court of

appeals should defer to the trial judge's assessment of the evidence, even if the court of appeals believes that it would have reached a different conclusion had it sat at the trial. The Seventh Circuit struck the right balance recently in applying *Gasperini* to sustain a new-trial order, "[b]ecause the very nature of the problem counsels restraint . . . [and w]e must give the benefit of every doubt to the judgment of the trial judge." *McClain* v. *Owens-Corning Fiberglass Corp.*, 139 F.3d 1124, 1127 (1998).

The Ninth Circuit's "stringent" standard of review hardly accords the required "considerable deference," when the trial judge has weighed the evidence, assessed the credibility of witnesses, and decided that the jury's verdict is against the fair weight of the evidence. Rather, the Ninth Circuit's "stringent" standard of review, as applied in this case, licenses the appellate court to substitute its judgment for the trial court's — despite "the better opportunity the trial judge has to appraise the situation." FEDERAL PRACTICE AND PROCEDURE, *supra*, at § 2819.

The court of appeals clearly erred, therefore, in applying a "stringent standard" in the guise of abuse-of-discretion review. See *General Electric Co.* v. *Joiner*, ___ U.S. ___, ___, 118 S. Ct. 512, 517 (1997) ("[i]n applying an overly 'stringent' review * * * [the court of appeals] failed to give the trial court the deference that is the hallmark of abuse of discretion review").

In addition, even the Ninth Circuit panel agreed that the amount of damages awarded here was grossly excessive. Nevertheless, the appellate court overturned the grant of a new trial and simply remanded for remittitur. This course, too, exceeded the appellate court's proper function. As this Court held just last Term in *Hetzel*, ___ U.S. at ___, 118 S. Ct. at 1212, it is properly within *the trial judge's* discretion to fashion an appropriate remedy for dealing with an excessive verdict by granting a new trial "without qualification"

rather than opting for the alternative the court of appeals selected, offering the plaintiff a remittitur in lieu of a new trial.

D. The Ninth Circuit's erroneous standards have very serious practical ramifications. They prevent trial judges from granting relief, even when the judges conclude that verdicts are not in line with the fair thrust of the evidence. As applied, the "stringent" standard also allows an appellate court to substitute its judgment for the trial judge's more informed evaluation of the "weight" of the evidence.

By applying its erroneous standard, the Ninth Circuit ignored the district court's "unique position to view the evidence." The court of appeals simply accepted at face value each of Ace's theories about how Aetna had failed to process her claim properly. On several occasions, the court of appeals styled the evidence as "undisputed." App. 3a-15a. This characterization is patently untrue, since — as the trial judge recognized — Aetna countered every one of plaintiff's theories with substantial countervailing evidence. *Id.* at 58a-62a. Indeed, the existence of a substantial dispute about the evidence properly led the trial judge to find that the weight of the evidence did not demonstrate that Ace had met the higher standard of proof that Alaska law demands for imposing punitive damages — "clear and convincing evidence" of "outrageous" conduct.

For example, the court of appeals asserted that punitive damages were permissible because of allegedly "undisputed" evidence showing, among other things, that Aetna based its denial of Ace's disability claim "on an illegal standard for benefit eligibility." App. 12a. This was one of Ace's central theories of punitive liability. In fact, however, as the trial judge appreciated and the court of appeals evidently did not, Aetna's witnesses testified that they denied the claim after applying a *concededly lawful* standard: they viewed the data as showing that Ace was capable of performing *her own job*.

SER 36-37; 43-44. Moreover, the contemporaneous documents confirmed that the company was actually applying a lawful standard.[3]

It is hardly surprising, therefore, that the trial judge expressly concluded that, rather than showing "undisputed" evidence establishing that Aetna had applied what the court of appeals called "an illegal standard for benefit eligibility" (App. 12a), the record contained such substantial evidence that Aetna had applied a *legitimate* standard that Ace's contentions to the contrary could not satisfy the "clear and convincing evidence" test. *Id.* at 58a-62a.

Another example of the Ninth Circuit's failure to defer to the trial judge's more informed assessment of the record concerns the content of the job that Aetna viewed Ace as capable of performing — "her own job." App. 5a, 60a. The court of appeals faulted Aetna for "determining the physical nature of Ace's occupation" by relying on her supervisor's "Physical Demands Analysis worksheet" while "ignor[ing]" the more complete job description that was attached, which purportedly showed that "Ace's position required her to engage in rigorous travel to remote communities." *Id.* at 5a.

This characterization, however, ignores what the trial judge saw and heard in the evidence. The court of appeals relied on Ace's original 1987 job description, which had described her job as involving travel to remote locations about 5% of the time. ER 111. Her supervisor testified, however, that the loan program on which she worked in the intervening

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[3] The Claim Department medical review form explicitly stated that the applicable test was whether the claimant was "Disabled any *Reasonable* Occ." (SER 2) (emphasis added). The actual determinations recorded the application of a lawful standard: "Claim denied — not T.D. any *reasonable* occ" (SER 4); "Not disabled *own* occ" (SER 3); and "Not disabled from any *reasonable* occupation" (SER 5) (emphases added).

years had narrowed considerably, and so had her tasks. SER 100-105. So, when he completed the *current* "Physical Demands" job description for her in February 1992 — just months before Ace claimed that her knee injury made her totally disabled to perform "any reasonable occupation," including her own — he reported that her job was "100%" inside her office, mainly sitting down. SER 1. Accordingly, the trial judge was amply justified in finding that Ace had failed to show by "clear and convincing evidence" that Aetna had acted "outrageously" in relying on accurate, contemporaneous information rather than on a stale and inaccurate form. App. 59a-62a.

This brief recital suggests why the Ninth Circuit was wrong in overturning the trial judge's decision to grant judgment as a matter of law to Aetna on the punitive damage claim. At most, however, the evidence on liability was "close" — as the trial judge characterized it (App. 58a) — and the decision to grant a "conditional" new trial was a particularly appropriate discretionary alternative. The Ninth Circuit was able to reject that determination only because it applied its excessively intrusive standard of review.

The erroneously "stringent" standards adopted by the Ninth Circuit, and by several other circuits, thus interfere with the power of the court most familiar with the actual evidence — the trial court — to exercise its better informed discretion to determine whether the jury's verdict is against the "weight" of the evidence.

II. DUE PROCESS REQUIRES SPECIAL DEFERENCE ON APPEAL TO ORDERS GRANTING NEW TRIALS ON PUNITIVE DAMAGE VERDICTS.

The new trial order here granted relief from a punitive damage award the trial judge viewed as unwarranted. Even greater deference should be paid to such orders, because the Due Process Clause itself requires "'meaningful and adequate review by the trial court'" of a punitive damage verdict. See

Honda Motor Co. v. *Oberg*, 512 U.S. 415, 420, 432 (1994) (due process requires careful, post-verdict judicial review because "[p]unitive damages pose an acute danger of arbitrary deprivation of property").

In every one of its decisions reviewing the validity of punitive verdicts, this Court has recognized the enormous threat that juries will impose this kind of punishment without legitimate foundation. The risk is especially grave where, as in this case, the target is an out-of-state corporation and the plaintiff explicitly urges the jury to "send a message" back to corporate headquarters in another part of the country. This is a reason why the trial judge's determination that the evidence does not properly warrant any "punishment" deserves the greatest respect.

Judicial control of defamation claims provides a pertinent parallel. In those cases, the Constitution imposes a special responsibility on the trial court "to review independently the evidence" and requires added deference on appeal to such a review. *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 686-687 (1989) (requiring heightened scrutiny of evidence supporting finding of "actual malice"); *Rattray* v. *City of National City*, 51 F.3d 793, 800 (9th Cir. 1994), cert. denied, 516 U.S. 820 (1995). So too in punitive damage cases, the trial court's duty "to review independently the evidence" should be entitled to special deference, when the trial judge concludes that a punitive award is unwarranted or excessive.

In *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), this Court unambiguously directed:

> "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or

> remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard."

Thus, when the trial court decides that a punitive award is against the weight of the evidence, it is faithfully implementing a form of protection derived directly from the Due Process Clause. There is no legitimate basis for constraining that corrective power by insisting, as the Ninth Circuit does, that the trial judge must rubber stamp any punitive verdict unless it is against the "great" weight of the evidence.

In addition, when the trial court exercises its discretion to grant a new trial in a punitive damage case, the court of appeals properly performs only a "limited function" in reviewing the order. The court of appeals must accord "considerable deference" to the district court's decision. *Browning-Ferris*, 492 U.S. at 280.

Moreover, most of the important factual issues weighed and decided by the trial judge in the typical case involving punitive damages turn on credibility determinations. These cases most often hinge on questions of motive and intent, good faith or bad faith. In deciding whether to sustain the jury's verdict, the trial judge, not an appellate panel reviewing a cold record, is in the "unique" position to make those credibility assessments. *Taylor*, 409 F.2d at 148. In this case, it was the trial judge who had the unique opportunity to observe the demeanor of the key witnesses, such as Ace herself, her expert witness, and Aetna's claims analysts.

This Court should grant review in this case to require the maximum deference on appeal to a trial court's decision to order a new trial in a punitive damages case.

III. IF FINDINGS ARE INSUFFICIENT UNDER RULE 50(c)(1) TO EXPLAIN THE GRANT OF A NEW TRIAL, THE PROPER PROCEDURE IS TO REMAND FOR ADDITIONAL FINDINGS, NOT TO REVERSE OUTRIGHT.

As explained above (at page 9), in moving for a conditional new trial on punitive damages, Aetna argued for that relief not only because the verdict was against the "weight of the evidence," but also on *six other* grounds, not dependent on the strength or weakness of the evidence. Those grounds included such issues as errors in instructions, improper closing argument, and excessiveness of damages suggesting passion and prejudice. In granting Aetna's motion, the trial judge specified that "[i]n general the court agrees with the arguments advanced by the defendant * * *." App. 49a.

The court of appeals stated that this formulation "failed" to satisfy the requirement of Rule 50(c)(1) that a court ruling on a conditional new-trial motion "shall specify the grounds for granting * * * the motion," because the judge had not "explicitly" enumerated the grounds on which he based his ruling. App. 14a. The court then proceeded to "infer," despite the trial judge's statement, that the conditional new trial was granted solely because of the "erroneous" view that the evidence was legally insufficient. Having rejected the finding of insufficiency in setting aside the judgment for Aetna as a matter of law, the court of appeals went on to reverse the order granting a new trial, directing the trial judge to reinstate the verdict on punitive liability.

That approach suffers from four serious flaws that merit this Court's review, because they seriously distort the proper procedure for acting on new trial motions and reviewing those orders.

First, it is beyond question that the trial judge had expressly relied on at least several of the grounds for relief Aetna had advanced, not simply the objection to the weight

of the evidence. Thus, on its face, the trial judge's order foreclosed the interpretation the court of appeals placed on it, as turning exclusively on the trial judge's view of the legal "insufficiency" of the evidence.

Second, nothing in Rule 50(c)(1) describes the specificity with which the trial judge must note the "grounds" for conditionally "granting or denying the motion for the new trial." It is not at all uncommon for trial judges to recite that they are accepting the arguments of one side or the other in granting *or denying* a new-trial motion. Indeed, the principal Rule governing motions for new trials, Rule 59(a), contains no requirement whatsoever that the trial judge recite *anything* to explain the decision to grant the motion. Compare Rule 59(c) (trial court "shall specify the grounds" for awarding a new trial "on its own initiative" rather than in response to a motion).

Thus, unlike Rule 52(a) for example, which requires the court in a bench trial to "find the facts specially and state separately its conclusions of law thereon," the Rule applicable here does not prevent a district judge from using a short-hand description incorporating "the grounds" for his ruling on a new-trial motion. The Ninth Circuit's approach erects an artificial requirement not warranted by the text or purpose of Rule 50(c)(1).

Third, even when a Rule calls for the district court to make specific findings, other circuits have held that those findings are sufficient if they are adequate to "indicate the factual basis for the ultimate conclusion" and inform the reviewing court about the reasons for the district court's decision. *Books* v. *Chater*, 91 F.3d 972, 978 (7th Cir. 1996); *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060, 1079 (1st Cir. 1995); *South-Western Publishing Co.* v. *Simons*, 651 F.2d 653, 656 n.2 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). Here, the district judge explained that he agreed "in general" with the arguments expressly enumer-

ated in Aetna's moving papers. That recital sufficiently incorporated "the grounds" for his order.

Fourth, and most fundamentally, if there was any fair doubt about the grounds on which the district judge relied, the proper remedy was to remand with directions to specify those grounds in fuller detail. It is the established practice of the courts of appeals to remand for such clarification, not to assume a basis for the ruling and then reject it. See, *e.g.*, *TEC Engineering Corp.* v. *Budget Molders Supply, Inc.*, 82 F.3d 542 (1st Cir. 1996); *NAACP* v. *Town of East Haven*, 70 F.3d 219 (2d Cir. 1995); *Preferred RX, Inc.* v. *American Prescription Plan, Inc.*, 46 F.3d 535 (6th Cir. 1995); *Liddell* v. *Board of Educ.*, 20 F.3d 324 (8th Cir. 1994). The contrary decision of the Ninth Circuit in this case presents a clear conflict in the circuits on this issue.

Moreover, the Ninth Circuit could not properly review — much less reverse — the order granting a new trial unless the court addressed and evaluated the grounds that actually motivated the trial judge's exercise of discretion. If the appellate court was right that the trial judge had not adequately described his reasons for granting relief, the court could not perform its review function without ascertaining why the judge entered the order.

The failure of the court of appeals to elicit any necessary clarification before proceeding to reverse the order and to reinstate the verdict was a further consequence of its erroneous arrogation of the power to conduct virtual *de novo* review of the new trial application. This failure denied Aetna its due-process right to fair appellate consideration of the grounds on which the trial judge had relied in setting aside the award of punitive damages and allowing a new trial.

This Court should therefore grant review to resolve the conflict among the courts of appeals on the proper procedures to be followed in assessing a district court's compliance with the requirements of Rule 50(c)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 96-35813 AND 96-36020
D.C. No. CV-94-00018-JWS

SHERRIE ACE,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

v.

AETNA LIFE INSURANCE COMPANY,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 5, 1997 — Seattle, Washington

Filed March 12, 1998
Amended May 7, 1998

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* Senior District Judge.

COUNSEL

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Jeffrey Feldman and Susan Orlansky, Young & Feldman, Anchorage, Alaska; Richard H. Friedman, Jeffrey K. Rubin, Friedman, Rubin & White, Anchorage, Alaska, for plaintiff-appellant.

Philip Lacovara, New York, New York, for defendant-appellee.

OPINION

SCHWARZER, Senior District Judge:

Sherrie Ace ("Ace"), a resident of Alaska, sued Aetna Life Insurance Company ("Aetna") in Alaska state court alleging that Aetna acted in bad faith in denying her claim for long-term disability benefits. Aetna removed the case to federal court pursuant to 28 U.S.C. §§ 1332, 1441.

The jury ruled for Ace on her bad faith claim and awarded her $27,009 for the wrongful denial of disability benefits and $100,000 for emotional distress. It also awarded her $16.5 million in punitive damages. The court then granted Aetna's post-trial motion for judgment as a matter of law on punitive damages and for a conditional new trial,[1] but denied its motions for judgment and for a new trial on the bad faith claim. It entered judgment for Ace in the amount of $127,009. Both parties appeal from the adverse rulings on their motions. Aetna also asserts error in the instructions to the jury with respect to emotional distress damages.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand.

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[1] At oral argument, Aetna's counsel advised that Aetna had also moved for remittitur of the punitive damage award but that the court had not ruled on its motion.

FACTS

A. Sherrie Ace's Accident

Ace was employed by the State of Alaska as a senior loan examiner. As a state employee, Ace participated in an Aetna group insurance plan, which provided both short-term and long-term disability benefits. She selected and paid monthly premiums for the maximum available health and disability coverage.

In December 1986, Ace broke her leg in a sledding accident, which completely shattered her knee. Despite multiple surgeries, the condition of Ace's knee deteriorated and she suffered chronic pain in her leg and in her lower back. On April 30, 1992, Ace's orthopedic surgeon, Dr. McEvoy, performed an osteotomy[2] on Ace's knee. Immediately prior to the osteotomy, Ace applied for and received short-term disability benefits from Aetna.

Dr. McEvoy released Ace on a "trial" basis for half-time, light duty work from August 1, anticipating that she would be able to return to full-time by mid-September.[3] Because her pain had worsened, Ace felt unready to return to work and expressed her concerns to Dr. McEvoy. He suggested that she find another doctor. Ace saw a specialist, Dr. Zorn, who informed her that the osteotomy had failed and that she would need a total knee replacement. That operation would have to wait, however, until April 1993 to permit her knee to heal.

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[2] In this procedure, a patient's bones are rebroken and recast in order to shift the patient's weight onto less-damaged parts of the knee.

[3] At trial, Dr. McEvoy stated that he referred to the release as "trial" because "[i]t alerts the insurer and the employer and the patient . . . that [returning to work] may not work."

B. Ace's Application for Long-Term Disability Benefits

Ace contacted Aetna and requested a long-term disability benefits application because her short-term disability benefits had expired early in September 1992. Aetna representatives advised her that although her policy required her to be "under the care of a physician," the physician need not be a specialist. Accordingly, Ace had Dr. Kiessling, her long-time family physician, complete Aetna's Attending Physician's Statement ("Statement"). On the form, he diagnosed Ace as suffering from "severe degenerative joint disease," stated that her condition had retrogressed, noted that she experienced "frequent swelling" and "constant pain," and rated her to be between 30-50% and 50-70% physically disabled.[4] Aetna received Ace's application, along with the Statement and Dr. McEvoy's July work release, on October 12, 1992.

On October 20, Aetna returned the Statement to Ace for signature by the physician and asked her to submit a physical capacities evaluation form, which had been prepared by a physical therapist in July.[5] Ace submitted these forms and queried Aetna several times about the status of her claim, indicating her urgent need.

C. Aetna's First Denial

On November 17, Aetna denied Ace's claim. In the denial letter, Stephen Elliott ("Elliott"), Aetna's account specialist, informed Ace that [i]n order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful

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[4] Aetna's form characterized 30-50% disabled as "Class III . . . capable of light work," and 50-70% disabled as "Class IV . . . capable of . . . sedentary activity."

[5] The form indicated that Ace could not work an eight-hour day but predicted that her condition would improve in four to six weeks.

occupation due to bodily injury or illness. He noted that according to the Statement — the most current medical evidence on file — Ace was capable of continuing her employment as a loan examiner because she could perform clerical, sedentary work. Therefore, he wrote, "we cannot consider you as being totally disabled from performing the duties of any gainful occupation as required by the policy," and denied her request for benefits.

Neither Elliott nor any other Aetna employee investigated Ace's claim other than to review the material sent by Ace. Elliott did have the material reviewed by Dr. John Galvin, an Aetna medical consultant, who reported that Ace had not established that she had a long-term disability. But Elliott did not contact Ace's medical care providers or obtain additional medical records, though Ace had signed a release. In determining the physical nature of Ace's occupation, Elliott relied entirely on Aetna's Physical Demands Analysis worksheet, ignored the more complete description that was attached,[6] and did not contact Ace or her supervisor to discuss her job's physical requirements.

The "unable to work at any gainful employment" phrase in Elliott's letter is drawn from Aetna's policy. In his deposition, Elliott testified he understood Aetna's policy to require Ace to be "totally disabled from any gainful employment" and "unable to do . . . any work," though he added that he would have denied her application even if he believed that Ace could only have worked half-time. Elliott's supervisor, Bryan Southall ("Southall"), testified, however, that he knew Aetna could not apply the "unable to work at any gainful employment" language literally, and that Aetna

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[6] Aetna's physical demands analysis work sheet described her position as 100% office-based. Ace's supervisor had attached a more complete description, explaining that Ace's position required her to engage in rigorous travel to remote communities.

did not apply it literally in Ace's case.[7] Both he and Elliott testified Aetna applied a "reasonableness" test in evaluating disability.[8] Aetna conceded at trial, however, that no one from Aetna ever told Ace that the policy was not being interpreted and applied literally.[9] Ace testified she had called Aetna several times, but no one would clarify the term "disabled" or suggest specific documents she should send. Based on what she had been told in the letter, she would have to be totally disabled to be eligible for benefits; she knew that her condition was not that bad but also that it did not permit her to perform her job.

D. Ace's Request for Reconsideration

Ace responded to Aetna's denial by writing a short letter requesting reconsideration.[10] She enclosed a longer letter from Dr. Kiessling, dated November 30, explaining why Ace should be considered totally disabled. Dr. Kiessling's letter

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[7] Both parties agree that insurers cannot lawfully apply this standard literally. *See Aetna Life Ins. Co.* v. *Orr*, 205 Ark. 566, 169 S.W.2d 651, 654 (1943); *Erreca* v. *Western States Life Ins. Co.*, 19 Cal.2d 388, 121 P.2d 689 (1942).

[8] Both Elliott and Southall testified they determined disability based on whether an applicant was capable of earning a monthly amount equal to her disability benefits. Ace's benefits equaled 70% of her salary; thus, under their reasonableness test, Ace should have received benefits if she was incapable of working at least 70% of the time at her current job.

[9] Aetna's practice was to quote only the language of the policy and not to inform claimants of the legal requirements governing interpretation of the policy or of informal reasonableness guidelines used in evaluating applications.

[10] Elliott's November 17 letter had informed Ace that she could appeal his denial but did not specify particular documents or information to send that would be helpful.

noted that Ace's condition had worsened since his earlier Statement, that she now needed "nearly continuous[ ] traction" to obtain any pain relief, that she had received epidural injections for her back pain, that she could not sit for prolonged periods of time, and that she was unable to perform clerical work. He reclassified her as a "Class V disability," which Aetna's form describes as "severe functional capacity; incapable of minimal (sedentary) activity."

E. Aetna's Response to the Request for Reconsideration

On December 11, Elliott responded to Ace's request. His letter stated that the information submitted by Ace had been reviewed by Aetna's medical consultant who had advised that "there is no objective medical evidence . . . to support your contention that you are unable to work at any gainful occupation." It reiterated that to receive benefits "you must be totally disabled . . . from working at any gainful occupation." The letter advised Ace that for Aetna to review her file, Ace would have to have her physicians "furnish . . . objective medical evidence to support [her] contention [of total disability]." Aetna's policy neither contains nor defines the term "objective medical evidence," and it did not inform Ace what would qualify as objective medical evidence; its claim handling guidelines, moreover, instruct analysts to consider subjective complaints of pain even in the absence of objective medical findings.[11]

Southall testified that he was uncertain whether Ace's documents contained objective medical evidence and that he would not be surprised if a claimant did not know whether a

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[11] Aetna's Proper Claim Handling Guidelines instruct claim analysts to "[c]onsider subjective complaints of the claimant as well as objective evidence" and give as an example "[a] disability claimant [who] genuinely appears to be in pain, although there are no objective medical findings."

physician's letter constituted objective or subjective evidence. He stated that what he wanted to see was Dr. Kiessling's chart notes, reports of examinations, and x-rays, but he never asked Ace or Dr. Kiessling to supply these materials.

Aetna's medical consultant, Dr. Galvin, again reviewed Ace's file and concluded there was no medical evidence to support Dr. Kiessling's opinion that Ace was in the Class V disability category. At trial, however, he conceded that Dr. Kiessling's letter contained objective medical evidence and that he was unable to ascertain from Ace's file whether she was disabled.

F. Ace's Response to Aetna's Second Response

Although Aetna's December 11 letter did not state that the claim had again been denied, it was the functional equivalent of a denial. When Ace received this letter, she had been without income since her short-term disability benefits expired in September and had begun to sell her personal property. She consulted a lawyer, Francine Harbour ("Harbour"), who wrote to Aetna on Ace's behalf "to facilitate the review process in this matter." Harbour's letter stated that Ace believed she already had furnished objective medical evidence but would submit additional information to "clarify any misunderstanding." To that end she requested that Aetna send to her "the pertinent claim adjustment guidelines that [Aetna] relied on in reaching [the] denial determination" and certain other material. She asked Aetna to provide the documents prior to her sending additional information, so that she could ensure that her submission was complete.

Southall responded to Harbour's request on January 28, 1993, stating, "There are no claim adjustment guidelines which we follow." During discovery, however, Aetna produced its "Proper Claim Handling Guidelines" contained

in its Methods and Procedures Manual,[12] and at trial Aetna's director of disability claims testified that the guidelines are mandatory for its claim analysts to follow.

G. Ace's Renewed Request for Reconsideration

On February 12, 1993, Harbour submitted an additional packet of materials to Aetna enclosing another Attending Physician Statement prepared by Dr. Kiessling on January 7, 1993, which rated Ace as a Class V disability, a letter by Dr. Kiessling summarizing the objective medical evidence upon which he based his opinion and explaining why Dr. McEvoy's July release should not carry dispositive weight,[13] and a physical capacities evaluation ("PCE") completed January 28, 1993. The PCE stated that Ace was capable of sitting, standing or walking for less than an hour each during the day.

Harbour's cover letter explained Ace's fragile physical, emotional and economic position and advised Aetna that unless it accepted Ace's application by March 1, Ace would file suit. By February 1993, Ace had been forced to sell much of her personal property and her home. She sent her eldest son to live with another family and she lived in her car from late February through early April.

H. Aetna's Response

Southall called Harbour on February 24, 1993, and left a phone message the content of which was disputed at trial. It may have confirmed that the denial of the claim stood or it may have been a request for an independent medical

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[12] *See* note 11, *supra*.

[13] In his letter, Dr. Kiessling stated that, "Dr. McEvoy's release ignored the slower than anticipated healing and associated pain of the osteotomy procedure . . . as well as the critically complicating feature of her low back pain."

examination ("IME"). In any event, after receiving the additional materials, Dr. Galvin and Southall had concluded that there was insufficient information to support a finding that Ace was disabled. Dr. Galvin considered Dr. Kiessling's letter as being of "no value" because of its tone, and asserted that he "[did] not accept Dr. K's opinion, he is not a specialist and we are not providing a social benefit service." Southall testified that he discounted Dr. Kiessling's letter because it was unaccompanied by Dr. Kiessling's chart notes, examination results or other materials. Neither Southall nor Dr. Galvin contacted Dr. Kiessling to discuss his letter or to ask him to submit materials to support his conclusions.

I. Aetna's Demand for an Independent Medical Examination

On March 4 Aetna wrote Ace a letter, directing her to appear before a designated physician for an IME on April 5, 1993. On advice of counsel, Ace refused to appear. On March 15, Aetna wrote to Harbour, reaffirming its decision to deny the claim on the basis of Ace's failure to produce proof of "[t]otal disability [which] is the inability to work at any gainful occupation due to sickness or injury." Ace then retained litigation counsel who attempted, unsuccessfully, to reschedule the IME.

J. End of Ace's Disability

On April 8, 1993, Ace's previously-scheduled knee surgery was performed. Dr. Zorn successfully replaced Ace's knee. Within two months, Ace was walking without crutches and returned to work. Her disability ended June 1, 1993.

DISCUSSION

1. Judgment as a Matter of Law—Punitive Damages

Judgment as a matter of law is appropriate only when the evidence, "viewed in the light most favorable to the nonmoving party," could not reasonably support the verdict.

Amarel v. *Connell*, 102 F.3d 1494, 1517-18 (9th Cir.1997), (as amended). We review the grant of a motion for judgment as a matter of law *de novo*. *Id.* at 1517.

To support punitive damages under Alaska law, a plaintiff must prove by clear and convincing evidence that the wrongdoer's conduct "was outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another person." Alaska Stat. § 09.17.020;[14] *State Farm Fire & Cas. Co.* v. *Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989) (quoting *Sturm, Ruger & Co.* v. *Day*, 594 P.2d 38, 46 (Alaska 1979), *modified on reh'g*, 615 P.2d 621 (Alaska 1980), *overruled on other grounds by Dura Corp.* v. *Harned*, 703 P.2d 396 (Alaska 1985)). Alaska courts will overturn a punitive damage award only if consideration of the record as a whole leaves them with a firm conviction of error and the need to intervene to prevent a miscarriage of justice. *Alaskan Village, Inc.* v. *Smalley*, 720 P.2d 945, 948 (Alaska 1986).

The district court concluded that no reasonable jury could find by clear and convincing evidence that Aetna acted with malice, bad motives or reckless indifference. After determining that the evidence did not support a finding of malice or bad motive, the court held that the evidence did not clearly and convincingly support a finding of reckless disregard, stating: A jury could find that by requiring the insured to marshall [sic] all the information, especially after Dr. Kiessling's second opinion was communicated, it is more likely than not that Aetna acted with enough disregard for Ace's interest to represent bad faith sufficient to breach the contract . . . but the evidence cannot support a finding that Aetna's disregard for Ace's interest was clearly and convincingly reckless to the point that Aetna should be punished. Plainly put, there is nothing outrageous about

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[14] The statute was amended in August 1997 to make minor textual changes not significant to the decision of this case.

relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty.

In ruling that while Aetna acted "with enough disregard for Ace's interest to represent bad faith" but not "clearly and convincingly reckless[ly]," the district court ignored significant and undisputed evidence. Focusing only on Aetna's "requiring the insured to marshall all the information" and "relying on the opinion of the most knowledgeable physician," the court failed to take into account substantial evidence[15] from which a jury could reasonably have found, clearly and convincingly, that Aetna acted with reckless indifference to Ace's interests.[16] That evidence, which is summarized in the preceding part of this opinion and is undisputed, includes the following conduct by Aetna: (1) basing denial of the claim on an illegal standard for benefit eligibility;[17] (2) failing to inform the claimant of the standard actually used by Aetna in evaluating disability claims;[18] (3)

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[15] The court also failed to take into account that Aetna had effectively twice denied the application before it asked for the IME; had it wished to "clear up any uncertainty," it would presumably have asked for the examination before it decided whether to grant or deny the application.

[16] Because under Alaska law, the jury could award punitive damages on evidence that Aetna acted with reckless indifference to Ace's interests, it is not necessary to address the court's findings with respect to malice and bad motives.

[17] *See* note 7, *supra*.

[18] Alaska law requires the insurance company to provide a reasonable explanation of the basis in the policy for denial of a claim. Alaska Stat. §§ 21.36.125(1) and (14).

failing to investigate the claim and to seek or request the supporting information alleged to be missing; (4) failing to assist the claimant in presenting her disability claim;[19] (5) relying on outdated prognoses of the claimant's expected recovery and disregarding recent reports of her actual condition; (6) denying her claim based on an undefined "requirement" not a term of her policy and contrary to Aetna's internal claim adjustment guidelines; (7) falsely advising the claimant that Aetna had no claim adjustment guidelines; and (8) making a last-minute demand for an IME after having denied the claim.

In evaluating the sufficiency of the evidence, the district court failed to consider it as a whole and to resolve all inferences in favor of the jury's verdict. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L.Ed.2d 777 (1962) ("In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."). Viewing the evidence in the light most favorable to the nonmoving party, we cannot say the evidence does not reasonably support an award of punitive damages.[20]

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[19] Alaska law requires an insurer upon receipt of notice of a claim, promptly to provide the necessary claim forms, instructions and assistance so that the claimant is able to comply with all reasonable requirements. Alaska Admin. Code tit. 3, § 26.040(a)(3) (1997).

[20] The two cases on which the district court relied, *State Farm Mut. Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), and *Nicholson*, 777 P.2d 1152, are inapposite. Both involved negotiations leading to disputes between the insured and the carrier over the amount to be paid on the insured's damage claim, the court holding that the evidence did not support a finding of "outrageous" conduct. Neither involved denial of coverage or benefits or other misconduct by the carrier.

2. Conditional Grant of New Trial — Punitive Damages

We have jurisdiction to review the conditional grant of a new trial order under Fed.R.Civ.P. 50(c)(1). *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 190 n. 15 (9th Cir.1989). The district court's order stated in relevant part:

> In general the court agrees with the arguments advanced by defendant and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision on the punitive damages claim there will be a new trial on that claim.

Rule 50(c)(1) states that the court "shall specify the grounds for granting the motion for the new trial." The court failed to do so here, at least explicitly, but it is a fair inference that it granted a new trial for the same reasons for which it granted judgment as a matter of law. The court's failure to rule on Aetna's request for a remittitur or to base its new trial order specifically on the magnitude of the punitive damage award, as opposed to the fact of the award, leads us to the conclusion that the new trial was granted on the erroneous ground that the evidence was insufficient as a matter of law. While our review of an order granting a new trial is for abuse of discretion, "a stringent standard applies when the motion is based on insufficiency of the evidence." *EEOC* v. *Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir.1997) (internal quotations omitted) (quoting *Venegas* v. *Wagner*, 831 F.2d 1514, 1519 (9th Cir.1987)). A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict "is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." *Id.*; *Roy* v. *Volkswagen of Am., Inc.*, 896 F.2d 1174 (9th Cir.), *as amended by* 920 F.2d 618 (9th

Cir.1990). The court made no such finding and the record would not support it.

Rule 50(c)(1) further provides that where "the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered." The rule contemplates that in a case such as this, we may give direction for further proceedings. *See* 28 U.S.C. § 2106 ("any [ ] court of appellate jurisdiction may . . . remand the cause and direct the entry of such . . . order . . . as may be just under the circumstances").

While the evidence was sufficient as a matter of law to support an award of punitive damages, whether the award was excessive is a different issue.[21]

> A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated and the defendant's wealth.

Alaskan Village, 720 P.2d at 949; *see also Sturm, Ruger & Co.*, 594 P.2d at 48; *Pluid* v. *B.K.*, 948 P.2d 981, 983 (Alaska 1997) (per curiam). No single factor is dispositive. *Sturm, Ruger & Co.*, 615 P.2d at 624 & n.3. The award must also pass muster under federal due process analysis. *BMW* v. *Gore*, 517 U.S. 559, 575-87, 116 S.Ct. 1589, 1599-1604, 134 L.Ed.2d 809 (1996) (identifying as "guideposts" that must be considered: (1) "degree of reprehensibility of the defendant's conduct"; (2) "ratio [of punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) "[c]omparing the punitive damage award and the civil or

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[21] Aetna does not contend that the award was the product of passion or prejudice.

criminal penalties that could be imposed for comparable misconduct").

Our review of the reported Alaska decisions leads us to the conclusion that the punitive damage award was excessive. Although not dispositive itself, the ratio of punitive-to-compensatory damages — 130 to 1 — is far beyond any approved by Alaska courts.[22] Moreover, the amount of punitive damages far exceeds the potential civil and criminal penalties for Aetna's actions.[23] Accordingly, we remand with directions to the district court to enter an order denying a new trial on punitive damages conditioned on Ace accepting a remittitur of punitive damages in an amount to be determined by the district court.

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[22] *See Pluid*, 948 P.2d at 984, 986 (upholding jury's 5-to-1 ratio of punitive to compensatory damages); *Day*, 615 P.2d at 624 (remitting jury punitive damage award, resulting in a 3.6-to-1 ratio); *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (upholding 3-to-1 ratio); *Teamsters Local 959* v. *Wells*, 749 P.2d 349, 361 n.26 (Alaska 1988) (upholding 2.54-to-1 ratio); *Ben Lomond, Inc.* v. *Campbell*, 691 P.2d 1042, 1048 (Alaska 1984) (upholding 2.38-to-1 ratio); *Alaskan Village*, 720 P.2d at 949 (upholding 2-to-1 ratio). *Cf. Cameron* v. *Beard*, 864 P.2d 538, 551 (Alaska 1994) (upholding 70-to-1 and 45-to-1 ratios). In *Cameron*, however, in addition to the $1,000 in compensatory damages received from each of the two individual defendants, the plaintiff also recovered $700,000 in actual damages from the State, another defendant. *Id.* at 544. Thus, the overall ratio of punitive to compensatory damages was 1-to-6.

[23] The maximum fine under the applicable provisions of the Alaska criminal code is $500,000. Alaska Stat. §§ 11.46.600(a)(2), 12.55.035(c)(1)(A).

3. Denial of Aetna's Motion for Judgment—Bad Faith Liability

The district court's denial of Aetna's motion may be reversed only if the evidence, construed in the light most favorable to Ace, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury's. *Acosta* v. *City & County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert. denied sub nom.*, *Yawczak* v. *Acosta*, ___ U.S. ___, 117 S.Ct. 514, 136 L.Ed.2d 403 (1996). We review de novo the denial of a motion for judgment as a matter of law. *Id.*

To prove bad faith, a plaintiff must establish "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Hillman* v. *Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993) (quoting *Anderson* v. *Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368, 376-77 (1978)). As the foregoing discussion shows, the court's denial of judgment as a matter of law is supported by the evidence that (1) Aetna did not investigate Ace's claim and shifted the burden of investigating entirely to her;[24] (2) Aetna did not gather any medical records, contact Ace's lawyers, or telephone Ace or her employer to obtain evidence relevant to her claim; (3) Aetna failed to disclose the standard it was obliged to use in evaluating a disability claim; (4) Aetna failed to provide a reasonable explanation for its denial of Ace's claim; (5) Aetna acted unreasonably in reviewing Ace's records by relying on outdated prognoses of her expected recovery and ignoring more recent reports on her actual condition; (6) Aetna failed

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[24] Aetna's claim handling guidelines instruct claims handlers to: "Obtain all available pertinent facts, not just those that are favorable to the company. Develop the claimant's case as well as the company's. If he is being treated by different doctors, obtain medical information from all of them."

to answer Ace's questions and to tell her what documents to submit in support of her claim; and (7) Aetna knew that Ace suffered from a chronic condition that had been predicted to deteriorate.

The foregoing discussion also disposes of Aetna's appeal from the denial of a new trial on its bad faith liability.

4. Denial of Aetna's Motion for New Trial on the Award of "Emotional Distress" Damages

Aetna appeals the denial of a new trial on the award of "emotional distress" damages, asserting that the district court erred by failing to instruct the jury that a plaintiff seeking emotional distress damages must prove that her distress was "severe" before any damages may be awarded. We review the denial of a new trial for abuse of discretion. *Wharf* v. *Burlington N. R.R. Co.*, 60 F.3d 631, 637 (9th Cir.1995). We hold that the district court did not abuse its discretion in denying Aetna's motion for a new trial.

Under Alaska law, breach of the implied covenant of good faith and fair dealing is actionable in tort against insurers. *Nicholson*, 777 P.2d 1152. Emotional distress is a category of damages in a bad faith case but is not an element of the claim. Alaska courts have never explicitly limited recovery of emotional distress damages in bad faith insurance cases to those instances where the plaintiff has shown "severe" emotional distress. However, *Aetna interprets Chizmar* v. *Mackie*, 896 P.2d 196 (Alaska 1995), a negligent infliction of emotional distress case, as requiring plaintiffs seeking emotional distress damages from any type of tort to prove that their distress was "severe" before any damages may be awarded.[25]

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[25] Aetna also relies on *Hillman*, 855 P.2d. at 1324. *Hillman* cites a Wisconsin case, *Anderson*, 271 N.W.2d at 376-77, which required severe emotional distress, but uses the case to explain the

Aetna's reliance on *Chizmar* is misplaced. The requirement that the damages be "severe" is an element of the underlying torts of negligent and intentional infliction of emotional distress, but not of the tort of breach of the duty of good faith and fair dealing by an insurer to an insured. *Chizmar*, 896 P.2d at 204 (negligent infliction); *Cameron* v. *Beard*, 864 P.2d 538, 548 (Alaska 1993) (intentional infliction). Aetna contends that the elements of the two torts, intentional infliction of emotional distress[26] and bad faith breach, are so similar that any attempt to distinguish them would be artificial. The argument overlooks the fact that Alaska courts have treated intentional infliction of emotional distress and bad faith breach cases differently. For instance, under Alaska law, a plaintiff cannot sustain a claim for intentional infliction of emotional distress unless the defendant's conduct rises to the level of outrageousness, which would warrant a punitive damage award. *Hawks* v. *Department of Pub. Safety*, 908 P.2d 1013, 1015 (Alaska 1995) (citing *Richardson* v. *Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985)). However, a plaintiff may successfully bring a bad faith breach claim and recover compensatory damages where the evidence was insufficient to support an award of punitive damages because it did not show

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objective and subjective elements of bad faith. The *Hillman* court did not address the severity of the emotional distress damages that must be proved or cite to the *Anderson* court's discussion of this issue. The fact that the court relied on one portion of the *Anderson* opinion does not support the claim that it also adopted other parts of the opinion.

[26] Under Alaska law, a claim for intentional infliction of emotional distress has three elements: (1) the defendant's conduct is extreme and outrageous; (2) the conduct is intentional or reckless; and (3) the conduct causes severe emotional distress. *Bishop* v. *Municipality of Anchorage*, 899 P.2d 149, 155 (Alaska 1995) (citing *King* v. *Brooks*, 788 P.2d 707, 711 (Alaska 1990)).

that the insurer's actions were outrageous or reckless. *Nicholson*, 777 P.2d at 1158; *Weiford*, 831 P.2d at 1267.

Moreover, the policy considerations for requiring severity to be shown do not support applying the requirement to bad faith insurance cases. As the court said in *Chizmar*, "The basic assumption underlying the traditional rule is that emotional distress without physical injury is relatively trivial and easily feigned." *Chizmar*, 896 P.2d at 201. In contrast, when an insurance company wrongly refuses to honor its obligations, emotional distress is a natural and believable response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. As insurance payments often serve as a safety net for the insured, Aetna's refusal to cover Ace's injury is foreseeably egregious.

The fact that the Alaska courts have applied the tort of bad faith breach only to insurance contracts between the insurer and the insured further demonstrates that these policy considerations do not come into play. See *Nicholson*, 777 P.2d at 1157. By allowing insureds to bring the action in tort, Alaska courts have relieved plaintiffs of the obligation of bringing a separate tort claim for negligent or intentional infliction of emotional distress. However, unlike a plaintiff in an insurance case, a plaintiff bringing a claim for bad faith breach of an employment contract would have to independently establish the tort of negligent or intentional infliction of emotional distress to recover emotional distress damages. *See, e.g.*, *ARCO Alaska, Inc.* v. *Akers*, 753 P.2d 1150, 1153-54 (Alaska 1988) (no independent tort for breach of good faith and fair dealing in an employment contract).

CONCLUSION

We AFFIRM the denial of Aetna's motions for judgment as a matter of law on bad faith liability, for a new trial on bad faith liability and for a new trial on emotional distress

damages. We REVERSE the grant of judgment as a matter of law on punitive damages and we VACATE the conditional grant of a new trial on punitive damages. We REMAND with direction to enter an order denying Aetna's motion for new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages in an amount to be determined by the district court.

Costs on appeal shall be awarded to Ace pursuant to Fed.R.App.P. 39(a).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35813 AND 96-36020
D.C. No. CV-94-00018-JWS

SHERRIE ACE,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

v.

AETNA LIFE INSURANCE COMPANY,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 5, 1997 — Seattle, Washington
Filed May 7, 1998

ORDER AMENDING OPINION AND GRANTING PETITIONS FOR REHEARING IN PART

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain, Circuit Judges, and William W. Schwarzer,* Senior District Judge.

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Jeffrey Feldman and Susan Orlansky, Young & Feldman, Anchorage, Alaska; Richard H. Friedman and Jeffrey K. Rubin, Friedman, Rubin & White, Anchorage, Alaska, for the plaintiff-appellant.

Philip Lacovara, New York, New York, for the defendant-appellee.

ORDER

The opinion filed on March 12, 1998, is hereby amended as follows:

1) by deleting all of the text contained in the paragraph beginning on slip opinion page 2267 at line 21 with the words "Our review . . ." and ending on page 2268, line 16, with ". . . a new trial)" and replacing it with the following:

> Our review of the reported Alaska decisions leads us to the conclusion that the punitive damage award was excessive. Although not dispositive itself, the ratio of punitive-to-compensatory damages — 130 to 1 — is far beyond any approved by Alaska courts.[1] Moreover, the amount of punitive damages

[1] *See Pluid*, 948 P.2d at 984, 986 (upholding jury's 5-to-1 ratio of punitive to compensatory damages); *Day*, 615 P.2d at 624 (remitting jury punitive damage award, resulting in a 3.6-to-1 ratio); *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (upholding 3-to-1 ratio); *Teamsters Local 959* v. *Wells*, 749 P.2d 349, 361 n.26 (Alaska 1988) (upholding 2.54-to-1 ratio); *Ben Lomond, Inc.* v. *Cambell*, 691 P.2d 1042, 1048 (Alaska 1984) (upholding 2.38-to-1 ratio); *Alaskan Village*, 720 P.2d at 949

far exceeds the potential civil and criminal penalties for Aetna's actions.[2] Accordingly, we remand with directions to the district court to enter an order denying a new trial on punitive damages conditioned on Ace accepting a remittitur of punitive damages in an amount to be determined by the district court.

2) by deleting the last sentence of the opinion at slip opinion 2272 and replacing it with the following:

> We REMAND with direction to enter an order denying Aetna's motion for new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages in an amount to be determined by the district court.

3) by deleting Judges Fletcher's dissent in its entirety.

4) by adding after the last sentence of the opinion:

> Costs on appeal shall be awarded to Ace pursuant to Fed. R. App. P. 39 (a).

In all other respects, the petitions are denied.

(upholding 2-to-1 ratio). *Cf. Cameron* v. *Beard*, 864 P.2d 538, 551 (Alaska 1994) (upholding 70-to-1 and 45-to-1 ratios). In *Cameron*, however, in addition to the $1,000 in compensatory damages received from each of the two individual defendants, the plaintiff also recovered $700,000 in actual damages from the State, another defendant. *Id.* at 544. Thus, the overall ratio of punitive to compensatory damages was 1-to-6.

[2] The maximum fine under the applicable provisions of the Alaska criminal code is $500,000. Alaska Stat. §§ 11.46.600(a)(2), 12.55.035(c)(1)(A).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35813 AND 96-36020
D.C. No. CV-94-00018-JWS

SHERRIE ACE,
PLAINTIFF-APPELLANT-CROSS-APPELLEE,

v.

AETNA LIFE INSURANCE COMPANY,
DEFENDANT-APPELLEE-CROSS-APPELLANT.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 5, 1997 — Seattle, Washington

Filed March 12, 1998

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain, Circuit Judges, and William W. Schwarzer,* Senior District Judge.

COUNSEL

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Jeffrey Feldman and Susan Orlansky, Young & Feldman, Anchorage, Alaska; Richard H. Friedman, Jeffrey K. Rubin, Friedman, Rubin & White, Anchorage, Alaska, for plaintiff-appellant.

Philip Lacovara, New York, New York, for defendant-appellee.

OPINION

SCHWARZER, Senior District Judge:

Sherrie Ace ("Ace"), a resident of Alaska, sued Aetna Life Insurance Company ("Aetna") in Alaska state court alleging that Aetna acted in bad faith in denying her claim for long-term disability benefits. Aetna removed the case to federal court pursuant to 28 U.S.C. §§ 1332, 1441.

The jury ruled for Ace on her bad faith claim and awarded her $27,009 for the wrongful denial of disability benefits and $100,000 for emotional distress. It also awarded her $16.5 million in punitive damages. The court then granted Aetna's post-trial motion for judgment as a matter of law on punitive damages and for a conditional new trial,[1] but denied its motions for judgment and for a new trial on the bad faith claim. It entered judgment for Ace in the amount of $127,009. Both parties appeal from the adverse rulings on their motions. Aetna also asserts error in the instructions to the jury with respect to emotional distress damages.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand.

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[1] At oral argument, Aetna's counsel advised that Aetna had also moved for remittitur of the punitive damage award but that the court had not ruled on its motion.

FACTS

A. Sherrie Ace's Accident

Ace was employed by the State of Alaska as a senior loan examiner. As a state employee, Ace participated in an Aetna group insurance plan, which provided both short-term and long-term disability benefits. She selected and paid monthly premiums for the maximum available health and disability coverage.

In December 1986, Ace broke her leg in a sledding accident, which completely shattered her knee. Despite multiple surgeries, the condition of Ace's knee deteriorated and she suffered chronic pain in her leg and in her lower back. On April 30, 1992, Ace's orthopedic surgeon, Dr. McEvoy, performed an osteotomy[2] on Ace's knee. Immediately prior to the osteotomy, Ace applied for and received short-term disability benefits from Aetna.

Dr. McEvoy released Ace on a "trial" basis for half-time, light duty work from August 1, anticipating that she would be able to return to full-time by mid-September.[3] Because her pain had worsened, Ace felt unready to return to work and expressed her concerns to Dr. McEvoy. He suggested that she find another doctor. Ace saw a specialist, Dr. Zorn, who informed her that the osteotomy had failed and that she would need a total knee replacement. That operation would have to wait, however, until April 1993 to permit her knee to heal.

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[2] In this procedure, a patient's bones are rebroken and recast in order to shift the patient's weight onto less-damaged parts of the knee.

[3] At trial, Dr. McEvoy stated that he referred to the release as "trial" because "[i]t alerts the insurer and the employer and the patient . . . that [returning to work] may not work."

B. Ace's Application for Long-Term Disability Benefits

Ace contacted Aetna and requested a long-term disability benefits application because her short-term disability benefits had expired early in September 1992. Aetna representatives advised her that although her policy required her to be "under the care of a physician," the physician need not be a specialist. Accordingly, Ace had Dr. Kiessling, her long-time family physician, complete Aetna's Attending Physician's Statement ("Statement"). On the form, he diagnosed Ace as suffering from "severe degenerative joint disease," stated that her condition had retrogressed, noted that she experienced "frequent swelling" and "constant pain," and rated her to be between 30-50% and 50-70% physically disabled.[4] Aetna received Ace's application, along with the Statement and Dr. McEvoy's July work release, on October 12, 1992.

On October 20, Aetna returned the Statement to Ace for signature by the physician and asked her to submit a physical capacities evaluation form, which had been prepared by a physical therapist in July.[5] Ace submitted these forms and queried Aetna several times about the status of her claim, indicating her urgent need.

C. Aetna's First Denial

On November 17, Aetna denied Ace's claim. In the denial letter, Stephen Elliott ("Elliott"), Aetna's account specialist, informed Ace that

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[4] Aetna's form characterized 30-50% disabled as "Class III . . . capable of light work," and 50-70% disabled as "Class IV . . . capable of . . . sedentary activity."

[5] The form indicated that Ace could not work an eight-hour day but predicted that her condition would improve in four to six weeks.

> [i]n order to be eligible for Long-term Disability Benefits, you must be totally disabled to the extent that you are unable to work at any gainful occupation due to bodily injury or illness.

He noted that according to the Statement — the most current medical evidence on file — Ace was capable of continuing her employment as a loan examiner because she could perform clerical, sedentary work. Therefore, he wrote, "we cannot consider you as being totally disabled from performing the duties of any gainful occupation as required by the policy," and denied her request for benefits.

Neither Elliott nor any other Aetna employee investigated Ace's claim other than to review the material sent by Ace. Elliott did have the material reviewed by Dr. John Galvin, an Aetna medical consultant, who reported that Ace had not established that she had a long-term disability. But Elliott did not contact Ace's medical care providers or obtain additional medical records, though Ace had signed a release. In determining the physical nature of Ace's occupation, Elliott relied entirely on Aetna's Physical Demands Analysis worksheet, ignored the more complete description that was attached,[6] and did not contact Ace or her supervisor to discuss her job's physical requirements.

The "unable to work at any gainful employment" phrase in Elliott's letter is drawn from Aetna's policy. In his deposition, Elliott testified he understood Aetna's policy to require Ace to be "totally disabled from any gainful employment" and "unable to do . . . any work," though he added that he would have denied her application even if he believed that Ace could only have worked half-time. Elliott's

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[6] Aetna's physical demands analysis work sheet described her position as 100% office-based. Ace's supervisor had attached a more complete description, explaining that Ace's position required her to engage in rigorous travel to remote communities.

supervisor, Bryan Southall ("Southall"), testified, however, that he knew Aetna could not apply the "unable to work at any gainful employment" language literally, and that Aetna did not apply it literally in Ace's case.[7] Both he and Elliott testified Aetna applied a "reasonableness" test in evaluating disability.[8] Aetna conceded at trial, however, that no one from Aetna ever told Ace that the policy was not being interpreted and applied literally.[9] Ace testified she had called Aetna several times, but no one would clarify the term "disabled" or suggest specific documents she should send. Based on what she had been told in the letter, she would have to be totally disabled to be eligible for benefits; she knew that her condition was not that bad but also that it did not permit her to perform her job.

D. Ace's Request for Reconsideration

Ace responded to Aetna's denial by writing a short letter requesting reconsideration.[10] She enclosed a longer letter

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[7] Both parties agree that insurers cannot lawfully apply this standard literally. *See Aetna Life Ins. Co.* v. *Orr*, 169 S.W.2d 651, 654 (Ark. 1943); *Erreca* v. *Western States Life Ins. Co.*, 121 P.2d 689 (Cal. 1942).

[8] Both Elliott and Southall testified they determined disability based on whether an applicant was capable of earning a monthly amount equal to her disability benefits. Ace's benefits equaled 70% of her salary; thus, under their reasonableness test, Ace should have received benefits if she was incapable of working at least 70% of the time at her current job.

[9] Aetna's practice was to quote only the language of the policy and not to inform claimants of the legal requirements governing interpretation of the policy or of informal reasonableness guidelines used in evaluating applications.

[10] Elliott's November 17 letter had informed Ace that she could appeal his denial but, did not specify particular documents or

from Dr. Kiessling, dated November 30, explaining why Ace should be considered totally disabled. Dr. Kiessling's letter noted that Ace's condition had worsened since his earlier Statement, that she now needed "nearly continuous[ ] traction" to obtain any pain relief, that she had received epidural injections for her back pain, that she could not sit for prolonged periods of time, and that she was unable to perform clerical work. He reclassified her as a "Class V disability," which Aetna's form describes as "severe functional capacity; incapable of minimal (sedentary) activity."

E. Aetna's Response to the Request for Reconsideration

On December 11, Elliott responded to Ace's request. His letter stated that the information submitted by Ace had been reviewed by Aetna's medical consultant who had advised that "there is no objective medical evidence . . . to support your contention that you are unable to work at any gainful occupation." It reiterated that to receive benefits "you must be totally disabled . . . from working at any gainful occupation." The letter advised Ace that for Aetna to review her file, Ace would have to have her physicians "furnish . . . objective medical evidence to support [her] contention [of total disability]." Aetna's policy neither contains nor defines the term "objective medical evidence," and it did not inform Ace what would qualify as objective medical evidence; its claim handling guidelines, moreover, instruct analysts to consider subjective complaints of pain even in the absence of objective medical findings.[11]

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information to send that would be helpful.

[11] Aetna's Proper Claim Handling Guidelines instruct claim analysts to "[c]onsider subjective complaints of the claimant as well as objective evidence" and give as an example "[a] disability claimant [who] genuinely appears to be in pain, although there are no objective medical findings."

Southall testified that he was uncertain whether Ace's documents contained objective medical evidence and that he would not be surprised if a claimant did not know whether a physician's letter constituted objective or subjective evidence. He stated that what he wanted to see was Dr. Kiessling's chart notes, reports of examinations, and x-rays, but he never asked Ace or Dr. Kiessling to supply these materials.

Aetna's medical consultant, Dr. Galvin, again reviewed Ace's file and concluded there was no medical evidence to support Dr. Kiessling's opinion that Ace was in the Class V disability category. At trial, however, he conceded that Dr. Kiessling's letter contained objective medical evidence and that he was unable to ascertain from Ace's file whether she was disabled.

F. Ace's Response to Aetna's Second Response

Although Aetna's December 11 letter did not state that the claim had again been denied, it was the functional equivalent of a denial. When Ace received this letter, she had been without income since her short-term disability benefits expired in September and had begun to sell her personal property. She consulted a lawyer, Francine Harbour ("Harbour"), who wrote to Aetna on Ace's behalf "to facilitate the review process in this matter." Harbour's letter stated that Ace believed she already had furnished objective medical evidence but would submit additional information to "clarify any misunderstanding." To that end she requested that Aetna send to her "the pertinent claim adjustment guidelines that [Aetna] relied on in reaching [the] denial determination" and certain other material. She asked Aetna to provide the documents prior to her sending additional information, so that she could ensure that her submission was complete.

Southall responded to Harbour's request on January 28, 1993, stating, "There are no claim adjustment guidelines which we follow." During discovery, however, Aetna pro-

duced its "Proper Claim Handling Guidelines" contained in its Methods and Procedures Manual,[12] and at trial Aetna's director of disability claims testified that the guidelines are mandatory for its claim analysts to follow.

G. Ace's Renewed Request for Reconsideration

On February 12, 1993, Harbour submitted an additional packet of materials to Aetna enclosing another Attending Physician Statement prepared by Dr. Kiessling on January 7, 1993, which rated Ace as a Class V disability, a letter by Dr. Kiessling summarizing the objective medical evidence upon which he based his opinion and explaining why Dr. McEvoy's July release should not carry dispositive weight,[13] and a physical capacities evaluation ("PCE") completed January 28, 1993. The PCE stated that Ace was capable of sitting, standing or walking for less than an hour each during the day.

Harbour's cover letter explained Ace's fragile physical, emotional and economic position and advised Aetna that unless it accepted Ace's application by March 1, Ace would file suit. By February 1993, Ace had been forced to sell much of her personal property and her home. She sent her eldest son to live with another family and she lived in her car from late February through early April.

H. Aetna's Response

Southall called Harbour on February 24, 1993, and left a phone message the content of which was disputed at trial. It may have confirmed that the denial of the claim stood or it

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[12] See note 11, *supra*.

[13] In his letter, Dr. Kiessling stated that, "Dr. McEvoy's release ignored the slower than anticipated healing and associated pain of the osteotomy procedure . . . as well as the critically complicating feature of her low back pain."

may have been a request for an independent medical examination ("IME"). In any event, after receiving the additional materials, Dr. Galvin and Southall had concluded that there was insufficient information to support a finding that Ace was disabled. Dr. Galvin considered Dr. Kiessling's letter as being of "no value" because of its tone, and asserted that he "[did] not accept Dr. K's opinion, he is not a specialist and we are not providing a social benefit service." Southall testified that he discounted Dr. Kiessling's letter because it was unaccompanied by Dr. Kiessling's chart notes, examination results or other materials. Neither Southall nor Dr. Galvin contacted Dr. Kiessling to discuss his letter or to ask him to submit materials to support his conclusions.

I. Aetna's Demand for an Independent Medical Examination

On March 4 Aetna wrote Ace a letter, directing her to appear before a designated physician for an IME on April 5, 1993. On advice of counsel, Ace refused to appear. On March 15, Aetna wrote to Harbour, reaffirming its decision to deny the claim on the basis of Ace's failure to produce proof of "[t]otal disability [which] is the inability to work at any gainful occupation due to sickness or injury." Ace then retained litigation counsel who attempted, unsuccessfully, to reschedule the IME.

J. End of Ace's Disability

On April 8, 1993, Ace's previously-scheduled knee surgery was performed. Dr. Zorn successfully replaced Ace's knee. Within two months, Ace was walking without crutches and returned to work. Her disability ended June 1, 1993.

DISCUSSION

1. Judgment as a Matter of Law—Punitive Damages

Judgment as a matter of law is appropriate only when the evidence, "viewed in the light most favorable to the nonmov-

ing party," could not reasonably support the verdict. *Amarel* v. *Connell*, 102 F.3d 1494, 1517-18 (9th Cir. 1997), (as amended). We review the grant of a motion for judgment as a matter of law *de novo*. *Id.* at 1517.

To support punitive damages under Alaska law, a plaintiff must prove by clear and convincing evidence that the wrongdoer's conduct "was outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another person." Alaska Stat. § 09.17.020;[14] *State Farm Fire & Cas. Co.* v. *Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989) (quoting *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *modified on reh'g*, 615 P.2d 621 (Alaska *1980), overruled on other grounds by Dura Corp.* v. *Harned*, 703 P.2d 396 (Alaska 1985)). Alaska courts will overturn a punitive damage award only if consideration of the record as a whole leaves them with a firm conviction of error and the need to intervene to prevent a miscarriage of justice. *Alaskan Village, Inc.* v. *Smalley*, 720 P.2d 945, 948 (Alaska 1986).

The district court concluded that no reasonable jury could find by clear and convincing evidence that Aetna acted with malice, bad motives or reckless indifference. After determining that the evidence did not support a finding of malice or bad motive, the court held that the evidence did not clearly and convincingly support a finding of reckless disregard, stating:

> A jury could find that by requiring the insured to marshall [sic] all the information, especially after Dr. Kiessling's second opinion was communicated, it is more likely than not that Aetna acted with enough disregard for Ace's interest to represent bad faith sufficient to breach the contract . . . but the evidence cannot support a finding that Aetna's disregard for Ace's interest was

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[14] The statute was amended in August 1997 to make minor textual changes not significant to the decision of this case.

> clearly and convincingly reckless to the point that Aetna should be punished. Plainly put, there is nothing outrageous about relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty.

In ruling that while Aetna acted "with enough disregard for Ace's interest to represent bad faith" but not "clearly and convincingly reckless[ly]," the district court ignored significant and undisputed evidence. Focusing only on Aetna's "requiring the insured to marshall all the information" and "relying on the opinion of the most knowledgeable physician," the court failed to take into account substantial evidence[15] from which a jury could reasonably have found, clearly and convincingly, that Aetna acted with reckless indifference to Ace's interests.[16] That evidence, which is summarized in the preceding part of this opinion and is undisputed, includes the following conduct by Aetna: (1) basing denial of the claim on an illegal standard for benefit eligibility;[17] (2) failing to inform the claimant of the standard actually used by

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[15] The court also failed to take into account that Aetna had effectively twice denied the application before it asked for the IME; had it wished to "clear up any uncertainty," it would presumably have asked for the examination before it decided whether to grant or deny the application.

[16] Because under Alaska law, the jury could award punitive damages on evidence that Aetna acted with reckless indifference to Ace's interests, it is not necessary to address the court's findings with respect to malice and bad motives.

[17] See note 7, *supra*.

Aetna in evaluating disability claims;[18] (3) failing to investigate the claim and to seek or request the supporting information alleged to be missing; (4) failing to assist the claimant in presenting her disability claim;[19] (5) relying on outdated prognoses of the claimant's expected recovery and disregarding recent reports of her actual condition; (6) denying her claim based on an undefined "requirement" not a term of her policy and contrary to Aetna's internal claim adjustment guidelines; (7) falsely advising the claimant that Aetna had no claim adjustment guidelines; and (8) making a last-minute demand for an IME after having denied the claim.

In evaluating the sufficiency of the evidence, the district court failed to consider it as a whole and to resolve all inferences in favor of the jury's verdict. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."). Viewing the evidence in the light most favorable to the nonmoving party, we cannot say the evidence does not reasonably support an award of punitive damages.[20]

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[18] Alaska law requires the insurance company to provide a reasonable explanation of the basis in the policy for denial of a claim. Alaska Stat. §§ 21.36.125(l) and (14).

[19] Alaska law requires an insurer upon receipt of notice of a claim, promptly to provide the necessary claim forms, instructions and assistance so that the claimant is able to comply with all reasonable requirements. Alaska Admin. Code tit. 3, § 26.040(a)(3) (1997).

[20] The two cases on which the district court relied, *State Farm Mut. Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), and *Nicholson*, 777 P.2d 1152, are inapposite. Both involved negotiations leading to disputes between the insured and the carrier

2. Conditional Grant of New Trial — Punitive Damages

We have jurisdiction to review the conditional grant of a new trial order under Fed. R. Civ. P. 50(c)(1). *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 190 n. 15 (9th Cir. 1989). The district court's order stated in relevant part:

> In general the court agrees with the arguments advanced by defendant and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision on the punitive damages claim there will be a new trial on that claim.

Rule 50(c)(1) states that the court "shall specify the grounds for granting the motion for the new trial." The court failed to do so here, at least explicitly, but it is a fair inference that it granted a new trial for the same reasons for which it granted judgment as a matter of law. The court's failure to rule on Aetna's request for a remittitur or to base its new trial order specifically on the magnitude of the punitive damage award, as opposed to the fact of the award, leads us to the conclusion that the new trial was granted on the erroneous ground that the evidence was insufficient as a matter of law. While our review of an order granting a new trial is for abuse of discretion, "a stringent standard applies when the motion is based on insufficiency of the evidence." *EEOC* v. *Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997) (internal quotations omitted) (quoting *Venegas* v. *Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987). A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict "is against the great weight of the evidence,

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over the amount to be paid on the insured's damage claim, the court holding that the evidence did not support a finding of "outrageous" conduct. Neither involved denial of coverage or benefits or other misconduct by the carrier.

or it is quite clear that the jury has reached a seriously erroneous result." *Id.*; *Roy* v. *Volkswagen of Am., Inc.*, 896 F.2d 1174 (9th Cir.), *as amended by* 920 F.2d 618 (9th Cir. 1990). The court made no such finding and the record would not support it.

Rule 50(c)(1) further provides that where "the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered." The rule contemplates that in a case such as this, we may give direction for further proceedings. *See* 28 U.S.C. § 2106 ("any [ ] court of appellate jurisdiction may . . . remand the cause and direct the entry of such . . . order . . . as may be just under the circumstances").

While the evidence was sufficient as a matter of law to support an award of punitive damages, whether the award was excessive is a different issue.[21]

> A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated and the defendant's wealth.

Alaskan Village, 720 P.2d at 949; see also *Sturm, Ruger & Co.*, 594 P.2d at 48; *Pluid* v. *B.K.*, 948 P.2d 981, 983 (Alaska 1997) (per curiam). No single factor is dispositive. *Sturm, Ruger & Co.*, 615 P.2d at 624 & n.3. The award must also pass muster under federal due process analysis. *BMW* v. *Gore*, ___ U.S. ___, 116 S. Ct. 1589, 1599-1604 (1996) (identifying as "guideposts" that must be considered: (1) "degree of reprehensibility of the defendant's conduct"; (2)

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[21] Aetna does not contend that the award was the product of passion or prejudice.

"ratio [of punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) "[c]omparing the punitive damage award and the civil or criminal penalties that could be imposed for comparable misconduct").

Our review of the reported Alaska decisions leads us to the conclusion that the punitive damage award was excessive. Although not dispositive itself, the ratio of punitive-to-compensatory damages — 130 to 1 — is much higher than any ratio approved by Alaska state courts. Moreover, the amount of punitive damages far exceeds the potential civil and criminal penalties for Aetna's actions.[22] The trend of reported Alaska decisions (subject to some variation taking into account unusual factual situations) reflects approval of punitive damage awards on the order of two to three times the amount of compensatory damages.[23] Taking all relevant factors into account, we conclude that Alaska courts would not approve an award in excess of three times compensatory

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[22] The maximum fine under the applicable provisions of the Alaska criminal code is $500,000. Alaska Stat. §§ 11.46.600(a)(2), 12.55.035(c)(1)(A).

[23] *See Pluid,* 948 P.2d at 984, 986 (upholding jury's 5-to-1 ratio of punitive to compensatory damages); Day, 615 P.2d at 624 (remitting jury punitive damage award, resulting in a 3.6-to-1 ratio); *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (upholding 3-to-1 ratio); *Teamsters Local 959* v. *Wells,* 749 P.2d 349, 361 n.26 (Alaska 1988) (upholding 2.54-to-1 ratio); *Ben Lomond, Inc.* v. *Cambell,* 691 P.2d 1042, 1048 (Alaska 1984) (upholding 2.38-to-1 ratio); *Alaskan Village,* 720 P.2d at 949 (upholding 2-to-1 ratio). *Cf. Cameron* v. *Beard,* 864 P.2d 538, 551 (Alaska 1994) (upholding 70-to-1 and 45-to-1 ratios). In *Cameron,* however, in addition to the $1,000 in compensatory damages received from each of the two individual defendants, the plaintiff also recovered $700,000 in actual damages from the State, another defendant. Id. at 544. Thus, the overall ratio of punitive to compensatory damages was 1-to-6.

damages in this case. Following the lead of the Alaska Supreme Court in *Sturm, Ruger & Co.*, 615 P.2d at 624, we will remand with directions to the district court to enter an order denying a new trial on punitive damages conditioned on Ace accepting a remittitur of punitive damages to $381,000. *See American Nat'l Bank & Trust* v. *Regional Transit Auth.*, 125 F.3d 420, 437 (7th Cir. 1997) ("We, like the district court, certainly have the authority to grant a new trial or a remittitur if the circumstances so warrant."); *In re Torcise*, 116 F.3d 860, 869 (11th Cir. 1997) (remanding with directions to enter remittitur in specified amount or, if plaintiff does not accept, a new trial).

3. Denial of Aetna's Motion for Judgment—Bad Faith Liability

The district court's denial of Aetna's motion may be reversed only if the evidence, construed in the light most favorable to Ace, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury's. *Acosta* v. *City & County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir.), *cert. denied sub nom., Yawczak* v. *Acosta*, ___ U.S. ___, 117 S. Ct. 514, 136 L. Ed. 2d 403 (1996). We review *de novo* the denial of a motion for judgment as a matter of law. *Id.*

To prove bad faith, a plaintiff must establish "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Hillman* v. *Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1324 (Alaska 1993) (quoting *Anderson* v. *Continental Ins. Co.*, 271 N.W.2d 368, 376-77 (Wis. 1978)). As the foregoing discussion shows, the court's denial of judgment as a matter of law is supported by the evidence that (1) Aetna did not investigate Ace's claim and shifted the burden of investigating

entirely to her;[24] (2) Aetna did not gather any medical records, contact Ace's lawyers, or telephone Ace or her employer to obtain evidence relevant to her claim; (3) Aetna failed to disclose the standard it was obliged to use in evaluating a disability claim; (4) Aetna failed to provide a reasonable explanation for its denial of Ace's claim; (5) Aetna acted unreasonably in reviewing Ace's records by relying on outdated prognoses of her expected recovery and ignoring more recent reports on her actual condition; (6) Aetna failed to answer Ace's questions and to tell her what documents to submit in support of her claim; and (7) Aetna knew that Ace suffered from a chronic condition that had been predicted to deteriorate.

The foregoing discussion also disposes of Aetna's appeal from the denial of a new trial on its bad faith liability.

4. Denial of Aetna's Motion for New Trial on the Award of "Emotional Distress" Damages

Aetna appeals the denial of a new trial on the award of "emotional distress" damages, asserting that the district court erred by failing to instruct the jury that a plaintiff seeking emotional distress damages must prove that her distress was "severe" before any damages may be awarded. We review the denial of a new trial for abuse of discretion. *Wharf* v. *Burlington N. R.R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995). We hold that the district court did not abuse its discretion in denying Aetna's motion for a new trial.

Under Alaska law, breach of the implied covenant of good faith and fair dealing is actionable in tort against insur-

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[24] Aetna's claim handling guidelines instruct claims handlers to: "Obtain all available pertinent facts, not just those that are favorable to the company. Develop the claimant's case as well as the company's. If he is being treated by different doctors, obtain medical information from all of them."

ers. *Nicholson*, 777 P.2d 1152. Emotional distress is a category of damages in a bad faith case but is not an element of the claim. Alaska courts have never explicitly limited recovery of emotional distress damages in bad faith insurance cases to those instances where the plaintiff has shown "severe" emotional distress. However, Aetna interprets *Chizmar* v. *Mackie,* 896 P.2d 196 (Alaska 1995), a negligent infliction of emotional distress case, as requiring plaintiffs seeking emotional distress damages from any type of tort to prove that their distress was "severe" before any damages may be awarded.[25]

Aetna's reliance on *Chizmar* is misplaced. The requirement that the damages be "severe" is an element of the underlying torts of negligent and intentional infliction of emotional distress, but not of the tort of breach of the duty of good faith and fair dealing by an insurer to an insured. Chizmar, 896 P.2d at 204 (negligent infliction); *Cameron* v. *Beard*, 864 P.2d 538, 548 (Alaska 1993) (intentional infliction). Aetna contends that the elements of the two torts, intentional infliction of emotional distress[26] and bad faith

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[25] Aetna also relies on *Hillman,* 855 P.2d. at 1324. *Hillman* cites a Wisconsin case, *Anderson,* 271 N.W.2d at 376-77, which required severe emotional distress, but uses the case to explain the objective and subjective elements of bad faith. The *Hillman* court did not address the severity of the emotional distress damages that must be proved or cite to the *Anderson* court's discussion of this issue. The fact that the court relied on one portion of the *Anderson* opinion does not support the claim that it also adopted other parts of the opinion.

[26] Under Alaska law, a claim for intentional infliction of emotional distress has three elements: (1) the defendant's conduct is extreme and outrageous; (2) the conduct is intentional or reckless; and (3) the conduct causes severe emotional distress. *Bishop* v. *Municipality of Anchorage,* 899 P.2d 149, 155 (Alaska 1995) (citing *King* v. *Brooks,* 788 P.2d 707, 711 (Alaska 1990)).

breach, are so similar that any attempt to distinguish them would be artificial. The argument overlooks the fact that Alaska courts have treated intentional infliction of emotional distress and bad faith breach cases differently. For instance, under Alaska law, a plaintiff cannot sustain a claim for intentional infliction of emotional distress unless the defendant's conduct rises to the level of outrageousness, which would warrant a punitive damage award. *Hawks* v. *Department of Pub. Safety,* 908 P.2d 1013, 1015 (Alaska 1995) (citing *Richardson* v. *Fairbanks N. Star Borough,* 705 P.2d 454, 456 (Alaska 1985)). However, a plaintiff may successfully bring a bad faith breach claim and recover compensatory damages where the evidence was insufficient to support an award of punitive damages because it did not show that the insurer's actions were outrageous or reckless. *Nicholson*, 777 P.2d at 1158; *Weiford,* 831 P.2d at 1267.

Moreover, the policy considerations for requiring severity to be shown do not support applying the requirement to bad faith insurance cases. As the court said in *Chizmar,* "The basic assumption underlying the traditional rule is that emotional distress without physical injury is relatively trivial and easily feigned." *Chizmar,* 896 P.2d at 201. In contrast, when an insurance company wrongly refuses to honor its obligations, emotional distress is a natural and believable response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. As insurance payments often serve as a safety net for the insured, Aetna's refusal to cover Ace's injury is foreseeably egregious.

The fact that the Alaska courts have applied the tort of bad faith breach only to insurance contracts between the insurer and the insured further demonstrates that these policy considerations do not come into play. *See Nicholson,* 777 P.2d at 1157. By allowing insureds to bring the action in tort, Alaska courts have relieved plaintiffs of the obligation of

bringing a separate tort claim for negligent or intentional infliction of emotional distress. However, unlike a plaintiff in an insurance case, a plaintiff bringing a claim for bad faith breach of an employment contract would have to independently establish the tort of negligent or intentional infliction of emotional distress to recover emotional distress damages. *See, e.g., ARCO Alaska, Inc.* v. *Akers,* 753 P.2d 1150, 1153-54 (Alaska 1988) (no independent tort for breach of good faith and fair dealing in an employment contract).

CONCLUSION

We AFFIRM the denial of Aetna's motions for judgment as a matter of law on bad faith liability, for a new trial on bad faith liability and for a new trial on emotional distress damages. We REVERSE the grant of judgment as a matter of law on punitive damages and we VACATE the conditional grant of a new trial on punitive damages. We REMAND with direction to enter an order denying Aetna's motion for new trial on punitive damages on condition that Ace accepts a remittitur of punitive damages to $381,000.

FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent from that portion of the opinion that would have our court dictate the amount of punitive damages for the purposes of remittitur. The majority picks a multiple of 3 out of the air, stating only that we are "taking all relevant factors into account . . ." Majority at 2268.

The Alaska Supreme Court has recently stated that "[t]he ratio between compensatory and punitive damages is merely a factor to be taken into account and we have never laid out a definitive permissible ratio." *Pluid* v. *B.K.*, 982 P.2d 981, 985 (Alaska 1997). The issue is one of state law. We should not imperially delegate to ourselves the decision as to what that ratio should be. When reviewing an award of punitive damages, Alaska courts look to a number of factors to

determine what is "manifestly unreasonable." *Id.* at 984. "Relevant factors include the compensatory damage amount, magnitude of the offense, importance of the policy violated, and the defendant's wealth." *Id.* If we had an adequate record and, in fact, could and did review the relevant factors, we could determine what is too much, but certainly not what is enough.

The majority pays only lipservice to the Alaska Supreme Court's determination that the facts, and not the ratio, drive the results of a review of punitive damages. The majority notes that the jury awarded a 130-1 ratio of punitive to compensatory damages and that Alaska typically approves "of punitive damage awards on the order of two to three times the amount of compensatory damages." Majority at 2267-68. Waving its judicial wand and invoking the incantation — [t]aking all relevant factors into account," the majority divines the proper award of damages to be three to one. *Id.*

The majority has engaged in no meaningful analysis. It does not even attempt to compare the facts of this case with those of other cases where different multipliers were approved. Were it our business to set maximums, the facts of this case would support a much higher award. The three discretionary factors outlined by *Pluid,* would support a much higher multiple. First, as to the "magnitude of the offense," we need only look to the harm caused to Ace, harm that her insurance was intended to avoid. She lost everything she had, including her home; she had to live in her car; and she had to send her child away because she couldn't care for him. Next, with respect to the "importance of the policy violated," Aetna's wrongful and bad faith refusal to cover Ace implicated a much broader company policy of wrongfully denying coverage to many who met the definition of "disabled," exhibiting a callous breach of trust owed to their insureds at a time when they are most vulnerable. Finally, the "defendant's wealth," is estimated at 1.7 billion dollars and the evidence presented demonstrates that Aetna's assets

would not be sufficiently diminished by the punitive damages award set by the majority. Punitive damages by definition are to be adequate in amount to punish the offender.

All of these factors weigh heavily in favor of a substantial award to Ace. In *Pluid,* a sexual battery case, the Alaska Supreme Court affirmed a 5-1 ratio of punitive damages to compensatory damages. *Id.* at 984. I see nothing in the opinion that suggests that the Alaska Supreme Court found this ratio to be high or even near the limit that would be acceptable. Certainly nothing in *Pluid* suggests that a 3-1 ratio represents a "standard." Indeed, there is strikingly little evidence of Alaska courts disturbing jury awards at all. Of the cases cited by the majority, the Alaska courts disturbed the jury's punitive damages award in only two, *Alaska Ins. Co.* v. *Movin' On Constr. Inc.*, 718 P.2d 472, 475 (Alaska 1986) (reducing punitives damages proportionally to a reduction of compensatory damages because it appeared that the jury had set punitives itself by using a 3 to 1 ratio); and *Sturm, Ruger & Co.* v. *Day,* 615 P.2d 621, 624 (Alaska 1980) (on rehearing increasing a cap it had previously set on the punitive damages from $250,000 to $500,000).

In *Sturm, Ruger & Co.*, the Alaska Supreme Court was dealing with its own law under the facts presented in that case. If we compare the facts of *Sturm, Ruger & Co.* to our facts, this case involves more egregious facts, a more important relationship — that of the insured to the insurer, and a greater likelihood of reoccurrence. Even so the Alaska Court set a ratio significantly higher in *Sturm, Ruger & Co.* than the majority sets here. Of the other cases cited by the majority, not only were the awards left undisturbed but the underlying facts and public policy concerns appear to have been less compelling than those before us. Moreover, in a later case, the Alaska Supreme Court denied a request to fix the amount of punitive damages at the appellate level. It explained that *Sturm, Ruger & Co.* was a case where "[i]t was only after an extensive trial record was established that

the appellate court reduced the award of punitive damages." *Pletnikoff* v. *Johnson,* 765 P.2d 973, 978 (Alaska 1988). It went on to state, as did the court in *Pluid,* that "[w]e have noted on numerous occasions that the factors to consider in awarding punitive damages are the amount of compensatory damages and, more importantly, the magnitude and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant." *Id.* at 978-79. As a federal appellate court, we have no business setting the amount of the remittitur in this case. The majority ignores the fact that a motion is pending before the district court to grant a remittitur. It should be ruled upon by the district court in the first instance where a proper record can be made.

APPENDIX D

MINUTES OF THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. J94-0018 CV (JWS)

SHERRIE ACE

v.

AETNA LIFE INSURANCE CO.

THE HONORABLE JOHN W. SEDWICK

Deputy Clerk, Pam Richter

Official Recorder, _____

APPEARANCES: for Plaintiff: -----

for Defendant: -----

PROCEEDINGS: **ORDER FROM CHAMBERS**

[Filed September 9, 1996]

The court has considered the motion for new trial at docket 228 and the opposition thereto. In general the court agrees with the arguments advanced by defendant and therefore grants the motion for a new trial as to the claim for punitive damages such that if the court of appeals should reverse this court's decision on the punitive damages claim there will be a new trial on that claim.

The question of whether there should be a new trial on the underlying tort claim for compensatory damages is a closer question. The court resolves that issue in favor of plaintiff.

The motion at docket 228 is GRANTED IN PART AND DENIED IN PART as set forth above.

ENTERED AT JUDGE'S DIRECTION
INITIALS: prr
DATE: September 9, 1996 Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Case No. J94-018 CV (JWS)

SHERRIE ACE, PLAINTIFF,

vs.

AETNA LIFE INSURANCE CO., DEFENDANT.

(Motion for Judgment, as
Matter of Law — Docket 214)

[Filed: July 2, 1996]

ORDER FROM CHAMBERS

MOTION PRESENTED

Plaintiff Sherrie Ace ("Ace") applied for disability benefits pursuant to an insurance policy issued by Aetna Life Insurance Company ("Aetna") . Aetna denied the application, and Ace sued, alleging that Aetna denied her claim in bad faith, and seeking compensatory and punitive damages. A jury trial was conducted in Juneau, Alaska, from May 20, 1996 through May 30, 1996. Upon conclusion of plaintiff's case, Aetna moved for judgment as a matter of law, which the court denied. At the close of all the evidence, Aetna again moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50. The court took the motion under advisement. The case was submitted to the jury, which returned a verdict for Ace awarding compensatory damages of $127,009 and punitive damages of $16,500,000. Aetna renewed its motion and the court invited further briefing.

Defendant's memorandum was filed at docket 214 and plaintiff's memorandum was filed at docket 216. No party has requested additional oral argument, and it would not be of material aid to the court.

This order also addresses plaintiff's motion at Docket 212, which requests that prejudgment interest begin to accrue on March 3, 1993.

DISCUSSION

1. Jurisdiction; Governing Law

This court has jurisdiction under 28 U.S.C. § 1332. The applicable substantive law in this diversity action is the law Alaska. *The Home Indemnity Co.* v. *Lane Powell Moss and Miller*, 43 F.3d 1322, 1325 (9th Cir. 1995).

2. Rule 50 Standard

Judgment as a matter of law is proper if the only reasonable conclusion supported by the evidence presented at trial would require judgment for the moving party; it is not proper where there is substantial evidence to support a judgment for the non-moving party. Evidence must be considered in the light most favorable to the non-moving party. *E.g.*, *Morgan* v. *Woessner*, 997 F.2d 1244, 1252 (9th Cir. 1993).

3. Insurance Bad Faith and Punitive Damages

The Alaska Supreme Court recognized a cause of action in tort for bad faith handling of a first party insurance claim in *State Farm Fire & Casualty Company* v. *Nicholson*, 777 P. 2d 1152 (Alaska 1989). The Alaska court explained that the tort cause of action arises from a breach of the covenant of good faith and fair dealing implied in the insurance contract. The court chose to allow a cause of action in tort for conduct which in other contexts would give rise only to a claim for breach of contract in recognition of the adhesionary nature of insurance contracts and to afford an adequate remedy to

insureds who would not be able to recover consequential damages on a contract cause of action. *Nicholson*, 777 P.2d at 1155-57. Noting that, as a tort cause of action, an insurance bad faith claim could support an award for punitive damages, the *Nicholson* court cautioned that such a cause of action cannot support an award of punitive damages unless the plaintiff can prove that the insurer engaged in conduct which was "outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another." 777 P.2d at 1158 (quoting *Sturm, Ruger & Co.* v. *Day*, 594 P.2d 38, 46 (Alaska 1979), *overruled on other grounds*, *Dura Corp.* v. *Harned*, 703 P.2d 396 (Alaska 1985)).

In *Nicholson*, and again in *State Farm Mutual Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), the Alaska Supreme Court made it clear that there are circumstances under which the evidence may be sufficient to present a jury question on a bad faith claim, but insufficient to support a claim for punitive damages. In both cases, the Alaska court found wanting evidence of the outrageous conduct required to warrant punishment.

In addition to the need to establish truly outrageous behavior, under Alaska law, a plaintiff has a higher burden of proof for the recovery of punitive damages than for the recovery of compensatory damages. To recover punitive damages, a plaintiff must prove the elements of her case by clear and convincing evidence. AS 09.17.020. This legislative recognition of the "narrow limits in which punitive damages should be allowed", *Weiford*, 831 P.2d at 1266 n. 2, is a corollary to the Alaska Supreme Court's admonition that punitive damages, "are not favored in law" and "are to be allowed only with caution and within narrow limits." *Weiford*, 831 P.2d at 1266 (quoting *Alaska Placer Co.* v. *Lee*, 553 P.2d 54, 61 (Alaska 1976)).

The facts in *Nicholson* were summarized by the Alaska court as follows:

In February, 1983 a water main . . . broke. The water main . . . ran (underground] beside the Nicholson house and other houses. . . . The escaping water caused the soil underneath the house to erode and settle. More than a year later, on March 27, 1984, the Nicholsons first contacted State Farm to report the loss. On April 6, 1984 Vere Hotchkiss, claims adjuster for State Farm, made an initial on-premise inspection, and returned again on April 11, 1984 with an engineer to conduct another inspection. Relying on the . . . engineering report which stated two possibilities for the loss *i.e.* water alone or permafrost and earth settling, State Farm denied coverage on April 22, 1984, because its policy contained an exclusion for [the second possibility]. Furthermore the . . . report recommended that the Nicholson house be observed during the winter of 1984-1985 to determine if any more settling would occur. Another consulting engineering report agreed . . ..

In the meantime State Farm agreed to cover the Nicholson's next door neighbor for the same loss. On June 14, 1984 State Farm now agreed to extend coverage to the Nicholsons for their loss and requested them to obtain property appraisals. On August 15, 1984 a general contractor . . . declined to give a repair estimate to the Nicholsons until a soil survey was performed [which was done during the 1984-85 winter]. During this time the Nicholsons experienced electrical and structural problems in their house. They were upset with the delay in fixing their house.

On May 29, 1985, a new State Farm adjuster [directed the Nicholsons to contact Pac-Rim Construction Services for an estimate on repair or replacement of the house.] The Pac Rim report was issued on June 14, 1985 [with estimates] well in excess of the policy limits of $113,264.

> State Farm then obtained an appraisal of the property [in the amount of] $98,200, and offered to pay that amount plus additional reimbursement for repair or replacement costs up to the policy limits. The offer was made on October 9, 1985. The Nicholsons rejected this offer and filed suit . . . .

777 P.2d at 1153-54. In the October 9, 1985 letter, State Farm also required the Nicholsons to complete a sworn statement of loss within 60 days. *Id.*, 777 P.2d at 1154 n. 1.

The *Nicholson* case was tried to a jury which returned a verdict awarding compensatory damages and punitive damages.[1] At trial:

> State Farm offered testimony from several witnesses that the adjustment of this claim was highly unusual, difficult, and complex. The Nicholsons offered testimony from Robert Lowe, as an expert independent claim adjuster, that State Farm's delay in deciding coverage and settlement of the claim was unreasonable and outrageous.

777 P.2d at 1154. Recognizing that State Farm's wrongful acts constituted a tort, the *Nicholson* court then addressed the sufficiency of the evidence to support an award of punitive damages. The court had no trouble concluding that it did not. "Based upon the factual scenario [set out at length above] we conclude that there was insufficient evidence as a matter of law to support a finding of outrageous conduct or a gross deviation from an acceptable standard of reasonable conduct in order to sustain an award of punitive damages." 777 P.2d at 1158.

In *State Farm Mutual Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), the Alaska court again examined

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[1] In *State Farm Fire & Casualty Co.* v. *Nicholson*, 777 P.2d 1152 (Alaska 1989), the jury awarded $107,500 in compensatory damages and $7,500 in punitive damages.

the sufficiency of evidence presented in a bad faith case where a jury had awarded both compensatory and punitive damages.[2] The court found that the evidence was sufficient to present a jury question on the bad faith claim, but insufficient to support a claim for punitive damages. Linda Weiford was injured in an automobile accident in August of 1984. She attempted to collect benefits under her uninsured motorist policy issued by State Farm. In October, 1984, she was diagnosed with a cervical strain. She initially demanded $17,500 and State Farm initially offered $3,408. After further negotiations, State Farm offered $5,000, and Weiford progressively reduced her demand until it was $10,000. In July 1986, Weiford was diagnosed with a nerve root injury at the seventh cervical vertebra, which injury the physician thought was attributable to the auto accident. Weiford then demanded the $25,000 policy limit and State Farm offered $7,500. Further negotiations brought State Farm up to $12,500, while Weiford reduced her demand to $18,500. Anticipating arbitration, State Farm requested that Weiford undergo an independent medical exam ("IME"). She agreed, and the IME confirmed the nerve root injury. State Farm then offered $17,500, which was countered by Weiford at $21,000. Prior to the arbitration, State Farm increased its offer to $20,000, but that was rejected. The arbitration resulted in an award to Weiford of $22,000, which State Farm paid. Weiford then sued for bad faith in the handling of her claim.

On appeal, Weiford argued that the award of punitive damages was justified because State Farm had adopted a "tough stance" policy on claim payments in 1984 and 1985 which led State Farm adjusters to make unreasonably low offers to Weiford. Weiford also pointed to a State Farm

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[2] In *State Farm Mutual Auto. Ins. Co.* v. *Weiford*, 831 P.2d 1264 (Alaska 1992), the jury awarded $18,007.50 in compensatory damages and $1,200,000 in punitive damages.

supervisor's note that indicated that State Farm should not exceed $20,000 in its offers to Weiford prior to arbitration, because with a policy limit of only $25,000, the insured would have more to lose at arbitration than the insurer.

As in *Nicholson*, the Alaska court let the compensatory damage award stand but found the evidence insufficient to support an award of punitive damages. The court wrote: "In our view, while there is some evidence which would justify a finding that State Farm was acting in bad faith, none of the evidence shows conduct that may fairly be categorized as outrageous." 831 P.2d 1261. Addressing Weiford's claim about the unreasonably low initial offers, the court noted the following:

> Given [plaintiff's expert's] testimony, the $5,000 offer might support a fact finder's conclusion that State Farm was guilty of bad faith. However, because of Weiford's high level of physical activity, the absence of definitive medical test results in 1985 and the fact that Weiford's physicians evidently believed that her injury would be self resolving, even this conclusion is fairly debatable. The evidence will not reasonably support the further conclusion that this offer was so low as to be outrageous.

831 P.2d at 1268 (footnote omitted).

4. Evidence In The Case At Bar

In their memoranda, the parties have set forth in considerable detail the evidence which was presented to the jury. Most of the evidence is listed or described at Docket 214 pp. 8-20, 22-27, 34-38, 42 and Docket 216 pp. 15-19, 23-26. A comparison of the parties, briefing discloses a considerable disagreement over the conclusions which may be drawn from the evidence presented, but no disagreement over what evidence was presented to the jury. The parties have adequately set forth the evidence presented, making it unnecessary to repeat it here.

5. Sufficiency of Evidence

Viewed in the light most favorable to Ace, this court concludes that a reasonable jury could have concluded that Aetna breached its obligation to deal fairly and in good faith with Ace in the processing of her claim for disability benefits, but that no reasonable jury could find that there was clear and convincing evidence that Aetna's conduct was outrageous.

Aetna had an obligation to investigate Ace's claim. However, up to the point at which Aetna made arrangements for the IME, rather than initiate inquiries of its own, Aetna relied upon Ace to present information to it. Aetna persisted in this approach even after it had reason to know that Ace's family doctor, Dr. Kiessling, held the opinion that Ace was disabled. While it is true that Dr. Kiessling had earlier opined that Ace's condition was substantially better, and it is also true that Dr. Kiessling did an abysmal job of explaining why his opinion had changed, Aetna nevertheless was alerted to the fact that one physician believed that Ace's condition had deteriorated to the point that she was disabled. Further, Dr. Kiessling's second opinion was the most recent opinion available to Aetna. Aetna also knew from the medical records that Ace's initial leg injury produced major damage and a chronic orthopedic condition which had already required several surgeries and was expected to require a complete replacement of her injured knee. On the other hand, Aetna also had received the opinion of Dr. Richard McEvoy ("Dr. McEvoy"), the orthopedic physician most familiar with Ace's condition, indicating that she could go back to work.

Although it is a close question, particularly in light of the fact that where an insurer has an objectively reasonable basis for denying a claim the denial does not constitute bad faith,[3]

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[3] *Hillman* v. *Nationwide mutual Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988) .

this court concludes that when all the evidence is viewed in the light most favorable to Ace, a reasonable jury could have found that Aetna acted in bad faith by not promptly making some affirmative inquiry after receiving Dr. Kiessling's second opinion. It bears emphasis that Ace was making a claim for disability in circumstances where the insurer had reason to know she suffered from a chronic condition that had been predicted to deteriorate. For the company to have continued to demand that Ace bring additional evidence to it in such circumstances could reasonably be viewed as unfair disregard for Ace's interest under the insurance contract.

The punitive damages issue must be evaluated in light of the Alaska court's holdings in *Nicholson* and *Weiford*. These cases underscore the fact that evidence of bad faith violation of the insurance contract is not enough to warrant imposition of punitive damages. The Alaska court requires proof of outrageous behavior. Moreover, the proof must be clear and convincing. With the examples provided by *Nicholson* and *Weiford* in mind, an examination of the evidence in the case at bar discloses inadequate support for the proposition that Aetna's conduct was clearly and convincingly "outrageous," represented "malice" toward Ace, was caused by "bad motives" or displayed a "reckless disregard" for Ace's interest.

There is no direct evidence that Aetna acted with malice toward Ace or from bad motives. Of course, such conditions may also be proved indirectly by inference from other evidence, *Alyeska Pipeline Service Co.* v. *O'Kelley*, 645 P.2d 767, 774 (Alaska 1982). Ace urges that evidence of bad motives or malice will be found in the fact that Aetna quoted the policy language respecting "any gainful occupation" in correspondence with Ace, rather than offering an explanation that the policy language could not be taken literally.

The "any gainful occupation" language quoted was the language actually used in a contract entered by Ace's

employer, the State of Alaska. The language was not language inserted into a policy presented to an individual insured on a take it or leave it basis. The language was contained in a contract between Aetna and a state government. The language was not actually employed by Aetna to deny benefits to Ace. Ace's qualification for disability benefits turned upon whether she was able to go back to work at her own job. That this was the central issue was clearly known by all the Aetna personnel involved in handling the claim. Whatever might be said about quoting back the "any gainful occupation" language in some other context, it is unreasonable to conclude that on the facts here it shows any malice toward Ace.

Ace argues that quoting back the "any gainful occupation" language also shows a bad motive: by quoting back a standard far higher than the law would allow Aetna to enforce literally, Aetna discourages claimants and bolsters its own bottom line. On the other hand, the evidence shows that Aetna uses the language in very few disability contracts and does not employ it literally. Significantly, there is no evidence in the record that Ace's hypothesis is viable. Ace was certainly not discouraged. Nor is there evidence that the language has discouraged anybody else. All Ace offered to support the viability of the hypothesis was the opinion of her expert, Barbara Paul. However, Ms. Paul offered no basis for her opinion. She had no relevant knowledge at all about claims experience under the State of Alaska insurance program in which Ace was enrolled, nor could she cite evidence from any other source to support her opinion. On the other hand, there was uncontradicted testimony from Steve Elliott and Bryan Southall, who currently are engaged in processing disability claims under both the rare "any gainful occupation" standard and more common modern formulations, that they have observed no difference in the behavior of insureds. There was also uncontradicted

testimony from Aetna's expert, Burt Bernstein, that Ms. Paul's opinion is not supported by the literature.

Even if one were to disregard all of the evidence on this point completely except Ms. Paul's speculation, her opinion is simply not clear and convincing evidence of a bad motive. It is a substantial reach from the hypothesis that accurately quoting back the "any gainful occupation" contract language in today's heavily lawyered society would possibly discourage disabled insureds from pursuing their rights to the conclusion that the possibility is considered a reality by Aetna such that a bad motive may be inferred. The vastly more reasonable inference is that in order to avoid claims against it based upon alleged misrepresentation by its claims processors, Aetna is careful to require such personnel to refer to the contract language in correspondence with claimants.

The manner in which Ace's claim was actually handled in terms of the information available to Aetna at each step in the process cannot support an inference of malice or bad motives. At all times, Aetna had knowledge of Dr. McEvoy's opinion which, given his role in Ace's care, was never persuasively contradicted by any other information. Moreover, the lay claims personnel referred the medical information to a qualified physician, Dr. Galvin, for review. He found no basis for concluding Ace was disabled. Despite Dr. Galvin's opinion, Aetna did make arrangements for an IME. Surprisingly, Ace declined the IME.

The evidence does not clearly and convincingly support the proposition that Aetna acted in "reckless disregard" for Ace's interest. A jury could find that by requiring the insured to marshall [sic] all the information, especially after Dr. Kiessling's second opinion was communicated, it is more likely than not that Aetna acted with enough disregard for Ace's interest to represent bad faith sufficient to breach the contract (and simultaneously give rise to the tort claim), but the same evidence cannot support a finding that Aetna's

disregard for Ace's interest was clearly and convincingly reckless to the point that Aetna should be punished. Plainly put, there is nothing outrageous about relying on the opinion of the most knowledgeable physician, Dr. McEvoy, to the exclusion of what little contrary indication of Ace's condition had emerged prior to asking for an IME, the one procedure that could be expected to clear up any uncertainty.

The court has carefully reviewed the evidence and considered the other arguments advanced by the parties. The court finds no merit in Aetna's arguments that an award of compensatory damages cannot be supported by the evidence. A reasonable jury could find for Ace on that issue. Similarly, the court finds no merit in Ace's arguments that an award of punitive damages is supported by clear and convincing evidence. A reasonable jury could not find for Ace on that issue.

6. Prejudgment Interest

Under Alaska law prejudgment interest begins to accrue on the date that process is served or that written notice of a claim is given to the defendant, and such written notice must be adequate to advise a "prudent person" that a claim will be made. AS 09.30.070(b). Here, there is no dispute that Francine Harbour's letter of March 3, 1993, was an adequate written notice, but Aetna argues it was vitiated by Roger DuBrock's indication that Ace would go ahead with the IME. DuBrock did not tell Aetna that Ace would not follow up on Harbour's threatened lawsuit.

The decision in *Himschoot* v. *Shanley*, 908 P.2d 1035, 1042 (Alaska 1996) suggests that a trial court should look to all the circumstances in deciding what a prudent person would believe. Here, the circumstances are that after a clear written notice that suit would be filed, there was a temporary indication that additional information (the IME) would be provided, there was no withdrawal of the threat of suit, and the lawsuit eventually was filed. The court agrees with the

observation of Ace's counsel: "The test is what a prudent person would believe; not what an optimistic person would believe." Docket 217 at p. 2. Therefore, prejudgment interest began to accrue on March 3, 1993.

CONCLUSION

For the reasons and to the extent set forth above, the motion for judgment as a matter of law by Aetna is **GRANTED IN PART** and **DENIED IN PART**. The motion at docket 212 is **GRANTED**.

The Clerk is directed to enter judgment for Ace for compensatory damages only in the amount of $127,009 and to provide for prejudgment interest at the State of Alaska statutory rate of 10.5 percent per annum from March 3, 1993 to the date judgment is entered.

DATED this 2nd day of July, 1996, at Anchorage, Alaska.

/s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE